TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 502. 233.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 11, 1909.

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1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in chancery sitting, at the United States court-room, in the city of Chicago, in said district and division, before the Hon. Peter S. Grosscup, circuit judge of the United States for the Seventh Judicial Circuit, on Tuesday, the thirtieth day of June, in the year of our Lord one thousand nine hundred and eight, being one of the days of the regular December term of said court, begun on Monday, the sixteenth day of December, 1907, and of our independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

2 In the Circuit Court of the United States for the Northern District of Illinois—Eastern Division.

INTERSTATE COMMERCE COMMISSION. *vs.* ILLINOIS CENTRAL RAILROAD COMPANY,	29116.

Be it remembered, that on this day, to wit, the first day of June, 1908, come the Illinois Central Railroad Company, by its solicitors, and filed in the clerk's office of said court its certain bill of complaint in words and figures following, to wit:

3 *Bill of complaint.*

In the Circuit Court of the United States within and for the Northern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, COMPLAINANT, *vs.* INTERSTATE COMMERCE COMMISSION, DEFENDANT.	In equity.

To the Honorable Judges of the Circuit Court of the United States within and for the Northern District of Illinois:

The Illinois Central Railroad Company alleges that it is a corporation duly organized under the laws of the State of Illinois, and that it is a citizen of the State of Illinois, engaged in operating a railroad as a common carrier within the States of Illinois, Iowa, South Dakota, Wisconsin, Tennessee, Kentucky, Mississippi, and Louisiana, and is engaged in interstate commerce between points in said various States, having its principal place of business and principal operating office in the city of Chicago, Illinois; that the matters and things concerning which this bill is filed and the relief herein asked for prayed involves more than the sum of two thousand dollars, exclusive of interest and costs, and that the matters and things, rights and privileges hereinafter mentioned and set forth, concerning which this

bill is filed, involve a dispute or controversy which depends upon the construction of a law or laws of the United States, and involve a Federal question, as will hereafter fully appear; that the defendant, the Interstate Commerce Commission, has been created and established, and during all the times hereinafter mentioned has existed under and by virtue of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof.

Your orator further alleges that it is a common carrier engaged in the transportation of property, including coal, from various points in the States along its line to points in other States, and that there are located along the line of your orator at various points coal mines and mining properties owned by various and sundry parties and operated by them; that your said orator as a common carrier transports commercial coal from said various mines along its line to points in the various States through which it passes, and that for many years your said orator has done so.

Your orator further alleges that certain of said mine owners and operators along its line are possessed of private cars owned by said operators, which are loaded by said operators with commercial coal for transportation by your said orator to various points along its line within the respective States through which it passes; that your said orator has no interest whatever in said private cars and derives revenue therefrom only by the freights paid for transporting said commercial coal.

Your orator further alleges that other railroad companies in whom your orator has no interest deliver unto your orator cars consigned to mines with which said foreign railway companies may have contracts for a fuel supply of coal; that said cars are loaded at said mines by the operators thereof and transported by your orator to the points of connection of said foreign railways; that said cars belong to said foreign railway companies and are known as foreign railway fuel cars; that your orator has no interest of any kind in such cars, but derives revenue from transporting them in the form of freight for coal hauled by it in such cars for delivery to such foreign railroads.

Your orator further alleges and represents that it is necessary to have at all times sufficient coal for use by said orator in its business as a common carrier; that it cannot operate as such common carrier or carry on its business as a railroad without an adequate and constant supply of coal.

Your orator alleges that it consumes in the necessary operation of its railroad from eight thousand to twelve thousand tons of fuel coal per day, and that your orator enters into contracts with various coal operators along its line by which your said orator purchases at the mines its necessary fuel coal, and said coal is loaded at the mine into the cars or locomotives of your said orator; that your orator requests bids from the various coal mines and operators along its line for a proportionate amount of said coal from said respective mines and operators.

Your orator further avers that all of the coal so purchased from the said various mines along its line under the contracts made and entered into is used for the necessary operation of its railroad; that no freight is assessed upon said coal; that no person, company,
6 firm, corporation, or locality, save only and excepting your said orator, has any right, title, or interest of any kind in or to said coal after the same has been delivered to your said orator at the mine tipple as aforesaid; that your orator is not engaged in the purchase and transportation of coal for the purpose of selling the same to any person or competing in any way with any shippers or consignees of commercial coal.

Your orator further avers that it has, even during periods of car shortage, ample motive power and employes to transport all cars that may be delivered to it from any source or for any purpose, and further that your orator's tracks, sidings, switches, right-of-way, and facilities other than cars are at all times, even during said period of car shortage, ample and adequate to handle, conduct, or transport all cars delivered to it from any source or for any purpose.

Your orator further alleges that at certain seasons of the year there is generally a shortage of cars and that it is impossible to furnish the various mines located along its line sufficient cars for the use of the said mines in transporting their commercial coal, creating what is known as a car shortage, and that during said times it is impossible for your said orator to furnish to all of said mines the complete equipment of cars desired by said operators of said mines for their use in transporting commercial coal.

Your orator further alleges that for said car shortage period it has adopted a system for the distribution of cars at said coal mines along its line, which rules were effective Aug. 1, 1907, and which rules were set forth in a circular issued by the superintendent
7 of transportation of your said orator, which circular was known as Circular No. 69, being as follows:

ILLINOIS CENTRAL RAILROAD COMPANY.

Office of the Superintendent of Transportation.

Circular No. 69.

CHICAGO, *July 20, 1907.*

RULES GOVERNING THE DISTRIBUTION OF CARS AT COAL MINES.

Effective August 1st, 1907, the following rules will govern the distribution of cars to coal mines located on the Illinois Central Railroad, and will supersede rules contained in circular issued by the undersigned dated August 22, 1906, which became effective September 1, 1906:

1. The established rating of a mine shall be the capacity fixed upon as a basis for car distribution.

2. The minimum established rating of any mine will be 200 tons. This includes mines under development.

3. To obtain an increased rating the coal mine operator will apply to the superintendent of the division upon which his mine is located.

4. To establish a reduced rating of any coal mine, the superintendent of the division upon which such mine is located will take the initiative.

5. When the propriety of any established rating is challenged by either the coal operator affected, or the railroad company, an investigation shall be made by the railroad company for a period of not less than one-half calendar month, to ascertain the amount of coal loaded upon railroad cars, and the actual number of hours during which the mine was in operation, and shall take into account all conditions which in the judgment of the railroad would affect the fairness of the established rating.

8 6. When the established rating of any mine is changed, all coal operators on the division shall be notified of the change.

7. A mine located on the Illinois Central Railroad and one or more foreign roads shall be given the same rating as though it were located on the Illinois Central Railroad only.

8. A mine located upon the Illinois Central Railroad and having also a river outlet shall be given the same rating as though it were located on the Illinois Central Railroad only.

9. A coal company having two or more mines in the same switching district may direct at what mine or mines the cars shall be placed, except that where any one mine has been shut down for more than thirty days, the rating for that time shall be deducted from the rating of the total number of mines, until operation is resumed at that particular mine.

10. Less than the established rating of a mine may be ordered, but when this is done the number of tons ordered shall be the rating, or 100 per cent for that day.

11. Cars loaded with Illinois Central Railroad Company's coal shall not be counted.

12. Cars furnished by foreign roads to be loaded with fuel coal shall not be counted.

13. Cars owned by coal mine operators, when placed at their own mines, shall not be counted.

14. All other cars (of all classes or ownership) shall be counted in the distribution, and the distribution of them shall be made according to the established rating or capacity of each mine in tons.

15. To equalize differences between large and small mines as to partially loaded cars left over at night, eighty (80) tons shall be deducted arbitrarily from the number of cars not billed out. After such deduction, all other cars left over at the mine shall be counted for that day and again the following day, and each successive day until loaded, except that when a mine has empties which are

9 not required they shall not be counted commencing with the day following the date the railroad company is given notice by the mine that such cars are not required.

16. If a mine is furnished less tonnage than its rating, the tonnage furnished shall be counted in accordance with these rules, whether the cars are loaded or not, if the cars have been ordered, and are properly placed in time to load and provided the minimum tonnage of cars is supplied.

17. If a mine loads more than its rating, the fractional part in excess of its rating will be charged, but the rating of the mine for that day shall be increased to the extent of the total tonnage loaded.

18. Coal operators are requested to inform the railroad company of the minimum tonnage necessary to have to operate their mine or mines.

19. When the railroad company fails to place sufficient cars at a mine on any day in time for loading, such cars shall not be counted against the mine, and the tonnage the mine lost as a result of the railroad company's failure shall be made good on the succeeding day, or as soon thereafter as is practicable.

20. Loads remaining on hand unbilled shall be counted as empties each day until shipping directions have been furnished.

21. If a mine loads cars against an embargo, billing will not be accepted, and such cars shall be counted against the mine the same as empties each day until the embargo is raised or other shipping directions furnished.

22. When a mine resumes work after having been closed down for any cause, it shall be furnished cars commencing with the day work is resumed on the same percentage basis as other mines in the same territory.

23. A record will be kept in the office of the superintendent of the railroad company showing the established rating of each mine, the tonnage furnished, and the percentage of each mine on his division. These records shall be kept open for the inspection of all interested operators.

24. A record shall be kept in the office of the superintendent of transportation at Chicago showing the percentages for each division and the railroad as a whole, and this record shall be open for the inspection of all coal operators on the system.

(Signed) O. S. KEITH,
Superintendent of Transportation.

Your orator further alleges that under said system of distributing cars your orator did not count against any mine in its pro rata share of distribution the private cars owned by said coal operators, neither did it count the cars used to transport railway fuel in the cars of foreign railway companies, neither did it count the cars used by your said orator in transporting its own fuel coal.

Your orator further avers that said mines upon its line were rated and are rated as a basis for car distribution upon the tonnage capacity of said mines.

Your orator further alleges that on or about the 31st day of October, 1907, the Illinois Collieries Company filed with the defendant,

the Interstate Commerce Commission, a complaint against your said orator under the act to regulate commerce, and acts amendatory thereof and passed by the Congress of the United States, alleging and claiming that said system, method and plan of car distribution was a regulation or practice unjust, unreasonable, and unfair, and worked a discrimination against said complainant, as discrimination is defined in said act of Congress hereinbefore referred to and known as the Interstate Commerce Act; and said complainant in its prayer
11 for relief asked that an order be made against the said defendant commanding the defendant to cease and desist from the said alleged violation of the act to regulate commerce, and that said commission determine the proper method of distribution of said cars, and that the defendant be ordered to include in the number of cars available for distribution among said mines in times of car shortage, foreign railway fuel cars, private cars owned by said mines, and cars used by your said orator in transporting its own fuel coal.

Your orator further alleges that a hearing was had upon said complaint and on the 13th day of April, 1908, said defendant announced its ruling and made the following order, to wit:

12 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

Glenn W. Traer, Receiver of the Illinois Collieries Company, *vs.* Chicago and Alton Railroad Company.	No. 1294.
Same *vs.* Chicago, Peoria & St. Louis Railway Company of Illinois.	No. 1295.
Same *vs.* Illinois Central Railroad Company.	No. 1317.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commision having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Com-
13 pany of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the first day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

It is further ordered, that said defendants be, and they severally are hereby, notified and required to establish, on or before said first day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage
14 because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars.

Your orator further avers that the said defendant, the Interstate Commerce Commission, served said orator by mailing a copy thereof to the principal officers of your orator respectively. Your orator avers that the said order of the said defendant, Interstate Commerce Commission, is unreasonable, unjust, oppressive, and unlawful. That

said method of distribution of cars during a period of car shortage as is in force and effect by said complainant did not and does not constitute discrimination under the acts of Congress, and especially as defined in what is known as the Interstate Commerce Act passed by the Congress of the United States, and which became a law on the 29th day of August, 1906.

Your orator further avers that said order of said defendant, Interstate Commerce Commission, in requiring your orator to put in force and effect a practice of taking into consideration in its distribution of cars to coal mines, private cars owned by said mines or operators is unjust, unreasonable, oppressive, and unlawful in that it at-
15 tempts to deprive said mine owners of the free use of said private cars purchased and owned by them.

Your orator further avers that said order of the said defendant, Interstate Commerce Commission, in requiring your orator to establish and put in force a practice of taking into consideration foreign railway fuel cars in determining the distribution of coal cars among the various mines along its lines and to count said foreign railway fuel cars as a part of the mine's pro rata proportion of commercial equipment is unreasonable, unjust, oppressive, and unlawful in that such foreign railway fuel coal in no way competes with commercial coal and there is no undue or unlawful discrimination in failing to count such foreign railway fuel cars against the mines receiving them.

Your orator further avers that the order of the said defendant, the Interstate Commerce Commission, in requiring your orator to count against the mines with which it has contracts for fuel supply, the cars used by your said orator in transporting its own fuel is unjust, unreasonable, oppressive, and unlawful, and that by said order said defendant is attempting to regulate the manner and method of your orator's conducting its business in those matters which in no way relate to the public or its duties as a common carrier, and that said order deprives your orator of its lawful right to contract with said mines with reference to its necessary fuel supply without interference by the said defendant, the Interstate Commerce Commission.

Your orator further avers that the said defendant, Interstate Commerce Commission, has no jurisdiction under said act of Con-
16 gress, hereinbefore referred to, to make an order requiring your said orator to count against the mines with which it has contracts the cars used by your said orator in transporting its own fuel supply, that said cars do not enter into the equipment available for public purposes, and that said fuel must be secured and transported by your said orator before it can perform its duties as a common carrier.

Your orator further avers that if said order of said defendant, the Interstate Commerce Commission, is allowed to become effective, very many suits for penalties will be brought against your said orator in various judicial districts of the United States by many persons interested in said order and its enforcement, and claiming to be in-

jured by the acts of your orator, unless said order is abated, which said suits will be prosecuted as aforesaid by many persons in many judicial districts of the United States against your said orator, whereby your orator will be subjected to a great multiplicity of suits and great loss and damage will be inflicted upon your said orator, all of which acts and doings will greatly injure, embarrass, and harass your orator in the transaction of its business.

Your orator further avers that notwithstanding the facts aforesaid, the said defendant, the Interstate Commerce Commission, maintains and intends to maintain, and will unless the same is enjoined or suspended by the order of this honorable court, maintain the said order as an effective order and institute or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your said orator.

17 Your orator further alleges that on or about the 28th day of August, 1907, in the Circuit Court of the United States for the Northern District of Illinois, an action was commenced against your said orator by the Majestic Coal & Coke Company, a corporation existing under the laws of the State of West Virginia, in which action an injunction was sought to restrain your said orator in its distribution of fuel cars, from charging against the full distributive share of the said Majestic Coal & Coke Company the private cars furnished by the purchasers of coal from the mines of the said Majestic Coal & Coke Company, or from counting against the mine foreign fuel cars furnished by any railway company obtaining coal from said mines; that said Circuit Court of the United States as aforesaid granted a temporary injunction restraining your said orator from taking into consideration in arriving at the distributive share of said complainant, Majestic Coal & Coke Company, any private cars belonging to or furnished by purchasers of coal, or any fuel cars furnished said Majestic Coal & Coke Company by any foreign railroad company, which said order was duly entered, and is as follows:

18 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss.

In the Circuit Court of the United States.

MAJESTIC COAL & COKE COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY. } In chancery.

This cause coming on to be heard upon the bill of the complainant herein, the demurrer of the defendant to such bill of complaint, and upon due notice by the complainant to the defendant of an application at this time for an injunction as prayed in the bill of complaint herein, and the parties hereto being present and represented by their respective counsel, and the court being fully advised in the premises, and having heard the arguments of counsel, it is now and hereby ordered that the defendant, Illinois Central Railroad Company, until the

further order of this court, be, and it now and hereby is, restrained and enjoined from enforcing or attempting to enforce the proposed rule No. 12 regarding the distribution by said defendant of its own system or railroad fuel cars, as mentioned and set forth in Exhibits A and B of the bill of complaint herein, and said defendant, Illinois Central Railroad Company, is further restrained and enjoined until the further order of this court, in its distribution of its own fuel or so-called "system cars," to charge against the distribution share of the complainant herein in and to said system cars at the mine of the complainant, as set forth in the bill herein, any private cars furnished the mine of the complainant, or any cars furnished by any railroad company other than the defendant, to the mine of
19 the complainant, for the transportation of coal from complainant's mine, purchased by said other railroad company, or by said other railroad company from said mine through others, and said defendant, Illinois Central Railroad Company, until the further order of this court, is further enjoined and restrained in its distribution of its own fuel cars to the complainant herein, or the mine of said complainant, from taking into consideration, in arriving at the distributive share of said defendant's fuel cars to be apportioned to said complainant, or its said mine, any private cars belonging to or furnished by purchasers of coal from said complainant, or its mine, or any fuel cars furnished said complainant by any railroad company other than the defendant purchasing coal of the defendant, or from its mine, either directly through said complainant, or through others purchasing from said complainant or its mine, and selling such coal to such other railroad company.

That afterwards, to wit, on or about the day of , said cause was submitted in the said United States Circuit Court for the Northern District of Illinois on a demurrer and motion to dissolve injunction, which demurrer and motion has not yet been determined by said honorable court, and your orator alleges that it is now restrained and enjoined from putting into force and effect, even if it desired to do so, a portion of the order of said defendant, as entered April 13th, 1907.

Your orator therefore prays that upon the filing of this bill a temporary or interlocutory order be entered herein suspending the order of said Interstate Commerce Commission and restraining the enforcement of said order of the said Commission and restraining said
20 Commission from taking any steps or instituitng any proceedings to enforce the said order, and that upon a final hearing of this cause, a decree be entered herein setting aside and annulling the said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of the said order and perpetually enjoining said defendant, the Interstate Commerce Commission or its members, their agents, servants, or representatives, from enforcing said order or from taking any steps or instituting any proceedings for the enforcement of said order.

Your orator further prays that if any delay intervenes between the filing of this bill and the issuance of a temporary interlocutory order

as prayed for herein, an order be issued herein suspending the order of the Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orator further prays that such other and further relief be granted in the premises as justice and equity may require.

Your orator further prays that your honors grant unto your orator a writ of subpoena of the United States of America directed to the Interstate Commerce Commission commanding it at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and their full, true, and complete answers make to all and singular the premises; but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide such order
21 and decree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And thus your orator will ever pray.

ILLINOIS CENTRAL RAILROAD COMPANY,
By J. M. DICKINSON, *General Counsel.*
W. S. KENYON,
Solicitor for Complainant.

J. M. DICKINSON,
Of Counsel.

STATE OF ILLINOIS, *County of Cook*, ss:

F. B. Harriman, being first duly sworn, says that he is the general manager of the Illinois Central Railroad Company, one of the complainants in the above entitled case, that he knows the facts stated in the above and foregoing bill of complaint and that the said facts are true.

F. B. HARRIMAN.

Subscribed and sworn to before me this day of May, 1908.
ANDREW P. HUMBERG,
[SEAL.] *Notary Public.*

(Endorsed:) Filed June 1, 1908. H. S. Stoddard, clerk.

22 And on to wit, the eleventh day of June, 1908, there was filed in the office of the clerk of said court in said entitled cause the certain affidavits of C. F. Parker, N. B. Morrison, and O. S. Keith, which said affidavits are respectively in the words and figures following, to wit:

Affidavit of C. F. Parker.

STATE OF ILLINOIS, *County of Cook*, ss:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

I, C. F. Parker, on oath do say that I am the purchasing agent for the Illinois Central Railroad Company; that I am a resident of

Cook County, Illinois; that said Illinois Central R. R. Co. is a corporation operating a line of railroad within the States of South Dakota, Minnesota, Iowa, Illinois, Tennessee, Kentucky, Mississippi, and Louisiana, with its principal offices and place of business in the city of Chicago, Illinois; that as such purchasing agent I have general charge of the making of contracts for the supply of company coal, and that I yearly make such contracts as I may deem necessary for said coal supply; that the necessary amount of coal for the use of said railroad company for its actual operating purposes is approximately from 8,000 to 12,000 tons per day; that the attempt is made by the said railroad company to purchase said coal from the various mines along its line; that in times of car shortage, which times occur at different periods during the winter months, the exact time being impossible to state or estimate, it is impossible to furnish all mines along the line of said Illinois Central Railroad Company with enough cars to transport all commercial coal from said mines; that in making contracts for the purchase of fuel coal for said railroad com-
23 pany it is understood that said mines making such contracts are to deliver and dump said coal at the mine and that cars are to be there for that purpose. It is further understood in making said contracts that said cars are in no way to be counted against the pro rata share of cars to be furnished said mine, said pro rata share being furnished on the basis of equipment for commercial coal; that said cars so used by the company in transporting coal from the mine to the point desired are not counted in pro rating the cars for said mine, neither are the private cars owned by any of said mines or the cars owned by foreign railroads used to transport fuel coal from the mines to said railroads; that said mines are rated for car supply according to the tonnage capacity thereof; that in making said contracts with said mines I endeavor to give to each mine the opportunity to bid upon a pro rata proportion of the coal needed by said railroad company, and I endeavor to prorate said contracts fairly among the various mines in order that they may receive contracts and thus assist in keeping the respective mines in operation, which is a general benefit to the public at large. I further say that said coal so purchased at the mines is in no way used by said railroad company for commercial purposes; it is not sold or traded in any way, but is used for the necessary purpose of supplying engines with coal, and such other purposes as may be necessary for the railroad in carrying out its duties as a common carrier. That it is necessary for said railroad company to know months in advance what its coal supply will be and to know that it is fixed, definite, and certain, otherwise the business of the railroad company would be greatly impeded, and it would be impossible for the railroad company to perform its duties as a common carrier. I further say that in order to make such contracts with mine owners for the supply of fuel coal for the railroad company it is necessary to furnish the mine owner with
24 cars for the loading of fine coals made necessary in the production of lump coal which the railroad company uses and which is practically the only coal purchased or used by the said rail-

road company; that in the mining of said coal for the use of the railroad company under said contracts the larger percentage of the same is lump coal; that in the production of said lump coal so-called screenings are of necessity produced, said screenings being composed of nut, pea, and slack coal; in the production of mine-run coal approximately 60 to 70% of the same is lump coal, the residue being what is called screenings.

If said order of the Interstate Commerce Commission was put into force and effect by the railroad company, and if, in times of car shortage, there was counted against the mines the cars used in transporting company coal and there was no pro rata share of cars at the said mines of cars for commercial business, the mine could not handle the nut, pea, and slack coal, which are the by-products in the production of said lump coal, and the contract made by the mine owners could not be carried out, and therefore, in the judgment of your affiant, it would be impossible to make contracts with coal operators or with coal mines to furnish lump fuel coal in sufficient quantities to meet the requirements of the railroads, and said order of the Commission would, in its operation, prevent the railroad company from contracting for a sufficient supply of coal to meet its requirements, and would practically deny to the railroad company the right to make the contracts, which its duty as a common carrier makes essential for it to do.

Your affiant further states that after the delivery of *of* said coal at the mine to the railroad company under said contract, the said mine owner or operator has no right, title, or interest of any kind in or to said coal, and the same becomes and is the property of the railroad company and is transported as its coal and that no freight is received therefor.

C. F. PARKER.

Subscribed in my presence and sworn to before me this 9th day of June, 1908.

[SEAL.] ANDREW P. HUMBURG,
Notary Public.

Service of this affidavit acknowledged and copy received this 11th day of June, 1908.

H. B. ARNOLD.

(Endorsed:) Filed June 11, 1908. H. S. Stoddard, clerk.

Affidavit of N. B. Morrison.

STATE OF ILLINOIS, *County of Cook, ss:*

In the Circuit Court of the United States, Northern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

I, N. B. Morrison, on oath, do say that I am a resident of Odin, Marion County, Illinois; that I have resided there for forty years;

that I am the president and chief owner of the Odin Coal Company, operating a mine at Odin, Illinois; that said mine has a capacity of one thousand tons per day; that I am given a rating by the Illinois Central Railroad Company for car distribution based upon the tonnage capacity of my mine; that for a number of years said company has made contracts with the Illinois Central Railroad Company to furnish to said railroad company a certain number of cars of coal per day for the railroad company's own use; that in the furnishing to the Illinois Central Railroad Company lump coal for which they contract there is a certain by-product necessarily created, known as screenings, composed of nut, pea, and slack, which approximates thirty per cent of coal so produced; that if the cars in which the railroad transports its coal purchased from said company, in times of car shortage, were to be counted in the share of cars to which said mine was entitled, and there should be no remaining cars in
27 which to load the by-products, it would be impossible to carry out a contract made with said railroad company for supplying it fuel coal, as contracted for, and I would not be willing as president of said company, under such circumstances where cars were to be so counted, to enter into a contract to furnish any specified and definite amount of fuel coal to said railroad company, and from my experience as an operator of mines, extended over a period of twenty-five years, and from my observation of the operation of other mines, and from my experience with owners and operators of other mines, I can say that, in my judgment, the railroad company could not make contracts with mines for a definite, fixed, and certain supply of lump coal unless they would furnish cars for the loading of the by-product so made.

I further say that the advantage in a contract to supply fuel coal for a railroad consists is in the fact that thereby the operator is enabled to book a fixed tonnage for the entire year, and also enabled to retain his mine forces, keep his mine in proper working condition, and the tonnage taken under said contract contributes to the successful operation of the mine in that no mine can be successfully operated without a goodly percentage of its operating capacity being purchased, in order to reduce the operating cost per ton to a minimum.

That said contract with the railroad company for a supply of fuel coal is desirable the same as any contract with any other corporation or person for large quantities of coal in certain stated amounts at fixed and definite periods; that the coal operator is not concerned from his standpoint with the question of cars in which said fuel coal may be transported by the railroad company, and it is immaterial to him whether the same is taken in cars by the railroad company, in wheel-barrows if that were possible, or in wagons, or by any other
28 method.

That the advantage to the operator is in securing the business under the contract.

That the Illinois Central Railroad Company invites bids each year from the operators along its line, and that said system as

practiced by the Illinois Central Railroad Company of rating the mines and furnishing the cars and placing its coal contracts is, I believe, a fair, equitable, and satisfactory method, and results in no undue advantage to any person or corporation.

I further say that the price of all coal furnished under contracts, either to the railroad or to any other parties, is governed largely by the amount of coal taken, regularity of delivery, etc., and the car question is merely incidental to the contract.

N. B. MORRISON.

Subscribed in my presence and sworn to before me, this tenth day of June, 1908.

[SEAL.] ANDREW P. HUMBURG,
Notary Public.

Service of this affidavit acknowledged & copy received this 11th day of June, 1908.

H. B. ARNOLD.

(Endorsed:) Filed June 11, 1908, H. S. Stoddard, clerk.

29 *Affidavit of O. S. Keith.*

STATE OF ILLINOIS, *County of Cook*, ss.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

I, O. S. Keith, on oath do say that I am a resident of Cook County, Illinois; that I am superintendent of transportation of the Illinois Central R. R. Co.; that said Illinois Central R. R. Co. is a corporation operating by virtue of a charter issued to it by the State of Illinois; that the principal place of business and principal office of said corporation is in the city of Chicago, State of Illinois; that my duties as such superintendent of transportation are to have general charge of the distribution of equipment, to provide cars as far as possible to meet the requirements of the traffic on different divisions of the road and on connecting railway lines, see that cars are moved promptly and are properly distributed, to order from contract mines the necessary supply of coal for the company's use and to make the distribution and vouchers for the same, and such other general duties as may be assigned to me by the general manager; that I have occupied such position for about four years; that I am familiar with the contracts made by the Illinois Central R. R. Co. for fuel coal; that I am also familiar with the amount of coal needed by the Illinois Central R. R. Co. for use in the operation of its engines and the general uses of the road, and in fact determine that question from a knowledge of the requirements of the road; that I am also familiar with the general car equipment of the road and with the motive

power of the road; that the Illinois Central R. R. Co. has owned by it at this time 22,436 gondola cars; that also at times box and
30 stock cars are used for loading and transporting coal; that the said Illinois Central R. R. Co. has in use 31,007 box cars and 2,299 stock cars, some of which are owned and some leased; that there are approximately 92 coal mines along the line of the Illinois Central R. R. Co. with which the said company had contracts for the past year, and it will be necessary to renew contracts with an equal or greater number for the ensuing year in order to secure the necessary coal for company use; that some six or seven of said mine operators own private cars which are loaded with coal by said mine operators for commercial purposes and transported by the railroad company under the regular tariff rates; that certain foreign railways have contracts with certain mines located on the line of the Illinois Central R. R. Co. for furnishing fuel coal to such railways, and that said Illinois Central R. R. Co. transports said coal in the cars of the foreign railway; that there is at times a car shortage on said Illinois Central R. R. from October until March, during which periods it is impossible to furnish to coal operators along the line all of the cars desired by them for their use in transporting commercial coal; that, as said supt. of transportation, I have promulgated rules for the distribution of cars, which rules are embodied in a certain circular known as No. 69, which is attached to this, my affidavit, and made a part hereof; that under said method of car distribution there is not counted against mines having contracts to furnish fuel coal the cars used in the transporting of said fuel coal of the said Illinois Central R. R. Co.; that there is not counted against mines having contracts with foreign railway companies the cars used in transporting the foreign railway fuel coal where the cars are furnished by the foreign railway company; but, where the cars are furnished by the
31 Illinois Central R. R. Co., they are counted against the proportion allotted to the mines; that the cars owned by the mines known as private cars, in which is transported commercial coal, are not counted against the proportion of cars allotted to the mine; that outside of these exceptions the cars are allotted to the various mines according to a percentage basis of distribution, which is determined by a system of rating based upon the tonnage capacity of the mines; that said method of determining the tonnage capacity is set forth in the circular No. 69 hereto attached and hereinbefore referred to and marked "Exhibit A;" that the cars used in transporting fuel for the Illinois Central R. R. Co. are loaded by the mine owners at the mine and no freight is charged or revenue received in any way for the transporting of said coal from the mines to the point where the coal is used by the company or stored for use; that the mine owner has no interest whatever in said coal after the same is loaded in the cars at the mine, but the same at once becomes and is the property of the railroad company.

Your affiant further states that even during periods of car shortage the said railroad company has ample motive power and employes to

transport all cars that may be delivered to it from any source or for any purpose, and that the tracks, sidings, switches, right of way, and facilities other than cars are at all times, even during such period of car shortage, ample to handle, conduct, or transport all cars delivered to it from any source or for any purpose; that said car shortage is in no way due to any fault or negligence on the part of the railroad company, but is attributable to the detention of
32 cars by shippers or consignees resulting from their failure to unload promptly coal or to give proper destination for the same; also the failure of foreign railroads to promptly return cars is an important factor in the car shortage situation; that it is impossible to ascertain in advance the precise time or times at which a shortage in cars may occur, due to reasons hereinbefore stated, and that it is impossible to guard or provide against said car shortage by any reasonable means or methods which a railroad company might adopt owing to the changing and uncertain conditions in the commercial world, and the different demands made at different times, so that it is impossible to have all the cars at all times necessary for all business that may arise; that the said Illinois Central R. R. Co. attempted to change its system of car distribution by counting against the mines private cars owned by said mines and the foreign railway fuel cars, and circular No. 70 was issued by me, copy of which is hereto attached, marked "Exhibit B;" that said circular was issued on the 15th day of August, 1907; that on the 28th day of August, 1907, an action was commenced in the Circuit Court of the United States for the Northern District of Illinois, against said Illinois Central R. R. Co. by the Majestic Coal & Coke Company, in which action an injunction was issued to restrain the said railroad company from putting into force and effect division or rule 12 of said circular, and temporary injunction or restraining order was issued by said court restraining the said Illinois Central R. R. Co. from taking into consideration in arriving at the distributive share of said com-
33 plainant, the Majestic Coal & Coke Company, any private cars belonging to the mines or any fuel cars furnished said Majestic Coal & Coke Company by any foreign railroad company; that said injunction or restraining order is now in force and effect and said railroad company can not carry out the order of the said Interstate Commerce Commission without violating the injunction issued by said honorable court.

O. S. KEITH.

Subscribed in my presence and sworn to before me this 9th day of June, 1908.

[SEAL.] ANDREW P. HUMBURG,
Notary Public.

Service of this affidavit acknowledged & copy received this 11th day of June, 1908.

H. B. ARNOLD.

34 Ex. A.

Illinois Central Railroad Company. Office of the Superintendent of Transportation.

Circular No. 69.

CHICAGO, *July 20, 1907.*

RULES GOVERNING THE DISTRIBUTION OF CARS AT COAL MINES.

Effective August 1st, 1907, the following rules will govern the distribution of cars to coal mines located on the Illinois Central Railroad, and will supersede rules contained in circular issued by the undersigned dated August 22, 1906, which became effective September 1, 1906:

1. The established rating of a mine shall be the capacity fixed upon as a basis for car distribution.

2. The minimum established rating of any mine will be 200 tons. This includes mines under development.

3. To obtain an increased rating the coal mine operator will apply to the superintendent of the division upon which his mine is located.

4. To establish a reduced rating of any coal mine the superintendent of the division upon which such mine is located will take the initiative.

5. When the propriety of any established rating is challenged by either the coal operator affected, or the railroad company, an investigation shall be made by the railroad company, for a period of not less than one-half calendar month, to ascertain the amount of coal loaded upon railroad cars and the actual number of hours during which the mine was in operation, and shall take into account all conditions which in the judgment of the railroad would affect the fairness of the established rating.

6. When the established rating of any mine is changed all coal operators on the division shall be notified of the change.

7. A mine located on the Illinois Central Railroad and one or more foreign roads shall be given the same rating as though it were located on the Illinois Central Railroad only.

8. A mine located upon the Illinois Central Railroad and having also a river outlet shall be given the same rating as though it were located on the Illinois Central Railroad only.

9. A coal company having two or more mines in the same switching district may direct at what mine or mines the cars shall be placed, except that where any one mine has been shut down for more than thirty days the rating for that mine shall be deducted from the rating of the total number of mines until operation is resumed at that particular mine.

10. Less than the established rating of a mine may be ordered, but when this is done the number of tons ordered shall be the rating, or 100 per cent for that day.

11. Cars loaded with Illinois Central Railroad Company's coal shall not be counted.

12. Cars furnished by foreign roads to be loaded with their fuel coal shall not be counted.

13. Cars owned by coal mine operators, when placed at their own mines, shall not be counted.

35 14. All other cars (of all classes or ownership) shall be counted in the distribution, and the distribution of them shall be made according to the established rating or capacity of each mine in tons.

15. To equalize differences between large and small mines as to partially loaded cars left over at night, eighty (80) tons shall be deducted arbitrarily from the number of cars not billed out. After such deduction all other cars left over at the mine shall be counted for that day and again the following day and each successive day until loaded, except that when a mine has empties which are not required they shall not be counted commencing with the day following the date the railroad company is given notice by the mine that such cars are not required.

16. If a mine is furnished less tonnage than its rating the tonnage furnished shall be counted in accordance with these rules, whether the cars are loaded or not, if the cars have been ordered and are properly placed in time to load and provided the minimum tonnage of cars is supplied.

17. If a mine loads more than its rating the fractional part in excess of its rating will be charged, but the rating of the mine for that day shall be increased to the extent of the total tonnage loaded.

18. Coal operators are requested to inform the railroad company of the minimum tonnage necessary to have to operate their mine or mines.

19. When the railroad company fails to place sufficient cars at a mine on any day in time for loading such cars shall not be counted against the mine, and the tonnage the mine lost as a result of the railroad company's failure shall be made good on the succeeding day or as soon thereafter as is practicable.

20. Loads remaining on hand unbilled shall be counted as empties each day until shipping directions have been furnished.

21. If a mine loads cars against an embargo, billing will not be accepted and such cars shall be counted against the mine the same as empties each day until the embargo is raised or other shipping directions furnished.

22. When a mine resumes work after having been closed down for any cause it shall be furnished cars commencing with the day work is resumed on the same percentage basis as other mines in the same territory.

23. A record will be kept in the office of the superintendent of the railroad company showing the established rating of each mine, the tonnage furnished, and the percentage of each mine on his division.

These records shall be kept open for the inspection of all interested operators.

24. A record shall be kept in the office of the superintendent of transportation at Chicago showing the percentages for each division and the railroad as a whole, and this record shall be open for the inspection of all coal operators on the system.

O. S. KEITH,
Superintendent of Transportation.

36 Ex. B.

Illinois Central Railroad Company. Office of the Superintendent of Transportation.

Circular No. 70. Canceling Circular No. 69 dated July 20, 1907.

CHICAGO, *August 15th, 1907.*

RULES GOVERNING THE DISTRIBUTION OF CARS AT COAL MINES.

Effective September 1st, 1907, the following rules will govern the distribution of cars to coal mines located on the Illinois Central Railroad:

1. The established rating of a mine shall be the capacity fixed upon as a basis for car distribution.

2. The minimum established rating of any mine will be 200 tons. This includes mines under development.

3. To obtain an increased rating the coal mine operator will apply to the superintendent of the division upon which his mine is located.

4. To establish a reduced rating of any coal mine the superintendent of the division upon which such mine is located will take the initiative.

5. When the propriety of any established rating is challenged by either the coal operator affected or the railroad company, an investigation shall be made by the railroad company, for a period of not less than one-half calendar month, to ascertain the amount of coal loaded upon railroad cars and the actual number of hours during which the mine was in operation, and shall take into account all conditions which in the judgment of the railroad would affect the fairness of the established rating.

6. When the established rating of any mine is changed all coal operators on the division shall be notified of the change.

7. A mine located on the Illinois Central Railroad and one or more foreign roads shall be given the same rating as though it were located on the Illinois Central Railroad only.

8. A mine located upon the Illinois Central Railroad and having also a river outlet shall be given the same rating as though it were located on the Illinois Central Railroad only.

9. A coal company having two or more mines in the same switching district may direct at what mine or mines the cars shall be placed, except that where any one mine has been shut down for more than

thirty days the rating for that mine shall be deducted from the rating of the total number of mines until operation is resumed at that particular mine.

10. Less than the established rating of a mine may be ordered, but when this is done the number of tons ordered shall be the rating, or 100 per cent, for that day.

11. Cars loaded with Illinois Central Railroad Company's coal shall not be counted.

37 12. All other cars (of all classes or ownership) shall be counted, and the distribution of them shall be made according to the established rating or capacity of each mine in tons, except as provided in Rule 10.

13. To equalize differences between large and small mines as to partially loaded cars left over at night, eighty (80) tons shall be deducted arbitrarily from the number of cars not billed out, except when the tonnage left over is less than eighty (80) tons. In such cases credit will be given for the actual tonnage only. After such deductions, all other cars left over at the mine shall be counted for that day and again the following day and each successive day until loaded, except that when a mine has empties which are not required they shall not be counted commencing with the day following the date the railroad company is given notice by the mine that such cars are not required.

14. If a mine is furnished less tonnage than its rating the tonnage furnished shall be counted in accordance with these rules, whether the cars are loaded or not, if the cars have been ordered and are properly placed in time to load and provided the minimum tonnage of cars is supplied.

15. If a mine loads more than its rating the fractional part in excess of its rating will be charged, but the rating of a mine for that day shall be increased to the extent of the total tonnage loaded.

16. Coal operators are requested to inform the railroad company of the minimum tonnage necessary to have to operate their mine or mines.

17. When the railroad company fails to place sufficient cars at a mine on any day in time for loading such cars shall not be counted against the mine, and the tonnage the mine lost as a result of the railroad company's failure shall be made good on the succeeding day, or as soon thereafter as is practicable.

18. Loads remaining on hand unbilled shall be counted as empties each day until shipping directions have been furnished.

19. If a mine loads cars against an embargo, billing will not be accepted, and such cars shall be counted against the mine the same as empties each day until the embargo is raised or other shipping directions furnished.

20. When a mine resumes work after having been closed down for any cause it shall be furnished cars commencing with the day work is resumed on the same percentage basis as other mines in the same territory.

21. A record will be kept in the office of the superintendent of the railroad company showing the established rating of each mine, the tonnage furnished, and the percentage of each mine on his division. These records shall be kept open for the inspection of all interested operators.

22. A record shall be kept in the office of the superintendent of transportation at Chicago showing the percentages for each division and the railroad as a whole, and this record shall be open for the inspection of all coal operators on the system.

O. S. KEITH,
Superintendent of Transportation.

(Endorsed:) Filed June 11, 1908. H. S. Stoddard.

38 And on to wit, the eleventh day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain notice to the Attorney-General. Which said notice together with the acceptance of service thereon endorsed is in the words and figures following to wit:

Notice.

In the Circuit Court of the United States within and for the Northern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY, complainant, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In equity.

To the Honorable Charles J. Bonaparte, Attorney-General of the United States:

Notice is hereby given you that on the first day of June, 1908, there was begun in the Circuit Court of the United States within and for the Northern District of Illinois a suit brought by the above-named complainant against the Interstate Commerce Commission, the object and prayer of which is to obtain a decree setting aside and annulling a certain order entered by the Interstate Commerce Commission specifically set forth in the bill of complaint in the said suit, copy of which is attached hereto; that said bill of complaint was filed in the office of the clerk of said court on the first day of June, 1908, and that due notice has been given that on the eleventh day of
39 June, 1908, at 10 a. m., an application for a temporary or interlocutory order suspending the said order of the said Interstate Commerce Commission and temporarily enjoining its enforcement will be presented to said court at the Federal court room in Chicago.

The complainant in said action hereby calls upon you to file with the clerk of said court in said cause the certificate provided for in the expediting act of February 11th, 1903, in accordance with the

provisions of section 16 of the act of Congress known as the "Interstate Commerce Act," approved June 29, 1906.

ILLINOIS CENTRAL RAILROAD COMPANY,
By W. S. KENYON, *Its Solicitor.*

J. M. DICKINSON, *K. Of Counsel.*

Service of this notice accepted and acknowledged this fourth day of June, 1908.

M. D. PURDY,
Acting Attorney-General.

(Endorsed:) Filed June 11, 1908. H. S. Stoddard, clerk.

40 And on to wit, the eighth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain certificate of the Attorney-General in words and figures following, to wit:

Certificate of Attorney-General.

In the Circuit Court of the United States for the Northern District of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION. } 29116.

To the clerk of said court:

I hereby certify that the above-entitled cause now pending in said court is a suit in equity brought by the Illinois Central Railroad Company against the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," as amended by the act of June 29, 1906, and that said suit is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress, entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903,

41 and in further compliance with the provisions contained in section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above-entitled cause and immediately furnish a copy thereof to each of the circuit judges of the seventh circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

CHARLES J. BONAPARTE,
Attorney-General.

Washington, D. C., June , 1908.

(Endorsed:) Filed June 8, 1908. H. S. Stoddard, clerk.

42 And on to wit, the eleventh day of June, 1908, come the Interstate Commerce Commission, by Mr. Edwin W. Sims, United States attorney for the Northern District of Illinois, and filed in the clerk's office of said court in said entitled cause its certain answer in words and figures following, to wit:

43 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant, *vs.* INTERSTATE COMMERCE COMMISSION, Defendant.	In equity. No. 29116.

Answer of Interstate Commerce Commission.

L. A. Shaver, solicitor for defendant. H. B. Arnold, special counsel.

44 In the Circuit Court of the United States, within and for the Northern District of Illinois, Eastern Division.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant, *vs.* INTERSTATE COMMERCE COMMISSION, Defendant.	No. 29116. In equity.

The answer of the Interstate Commerce Commission, the defendant herein, to the bill of complainant of the above-named complainant.

This defendant, the Interstate Commerce Commission, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer, answering, saith:

I.

45 That this defendant is a bureau or department of the Government of the United States which was created and established and now exists under and by virtue of an act of the Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by subsequent acts, and particularly as amended by the act of June 29, 1906, and that the complainant is a common carrier engaged in the interstate transportation of passengers and property, and as such common carrier and in re-

spect to such transportation is subject to the provisions of said act entitled "An act to regulate commerce," and said acts amendatory thereof and supplementary thereto.

II.

That by section 12 of said act this defendant is given authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act;" and that among the provisions of the act which this defendant is authorized and required to execute and enforce is the provision of section 1 thereof, requiring "all charges made for any services rendered or to be rendered in the transportation of passengers or property or in connection therewith to be just and reasonable," and forbidding every unjust and unreasonable
46 charge for such service or any part thereof; and, also, the provisions of section 3 thereof, which declares that "it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

III.

That by section 13 of said act it is provided that, among others, any person, firm, corporation, or association may make complaint to this defendant by petition, briefly stating the facts, "of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof;" that a "statement of the charges thus made shall be forwarded" by this defendant "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified" by this defendant; that if such common carrier "shall not satisfy the claim, or there shall appear to be any rea-
47 sonable ground for investigating said complaint, it shall be the duty" of this defendant "to investigate the matters complained of in such manner and by such means as it shall deem proper;" and by section 14 it is provided that whenever an investigation shall be thus made by this defendant "it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of" this defendant, "together with its decision, order, or requirement in the premises."

IV.

That by section 15 of said act it is provided that the defendant is authorized and empowered and it shall be its duty to determine and

prescribe what regulation or practice in respect to transportation is just, fair, and reasonable to be thereafter followed, referring thereby, as provided in said section 15, to transportation of persons and property as defined in the first section of said act, which includes "cars and other vehicles and all instrumentalities and facilities for shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, and handling of property transported."

That by said section 15 the defendant is authorized to make
48 an order that the carrier shall cease and desist from such violation of said act and that the carrier shall conform to the regulation or practice so prescribed.

V.

Defendant admits that complainant is a corporation duly organized under the laws of the State of Illinois; that it is a citizen of the State of Illinois; that it is engaged in operating a railroad as a common carrier within the States of Illinois, Iowa, South Dakota, and other States; that it is engaged in interstate commerce between points in various States, having its principal place of business and operating an office in the city of Chicago, Illinois; that the matters and things involved in this cause exceed the sum of two thousand dollars, exclusive of interest and costs; that the matters and things involved in this cause concern a dispute or controversy which depends upon the construction of a law or laws of the United States, and involve a Federal question, and that the defendant was created and established and now exercises authority under and by virtue of an act of Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof.

VI.

Defendant admits that complainant is a common carrier
49 engaged in the transportation of property, including coal, from various points in the States along its line to points in other States; that there are coal mines and mining properties owned and operated by various parties along defendant's line of railroad; that complainant as a common carrier transports commercial coal from said mines on its line to points in the various States through which it passes; that certain of said mine owners and operators own private cars which are loaded by them with commercial coal for transportation by complainant to various points within the several States through which complainant's railroad passes, and that complainant has no interest in said private cars and derives revenue therefrom by the freights paid for transporting said commercial coal.

VII.

Defendant admits that other railroad companies in which complainant has no interest deliver to complainant cars, consigned to

mines with which said foreign railroad companies may have contracts, for a supply of coal; that said cars are loaded at said mines by the operators thereof and transported by complainant to the points of connection with said foreign railways; that said cars belong to said foreign railway companies and are known as "foreign railway fuel cars," and that complainant has no interest in said cars, but derives revenue in the form of freight on the coal hauled in such cars for delivery to such foreign railways.

VIII.

Defendant admits that it is necessary for complainant to have sufficient coal for the operation of its business as a common carrier; that such coal amounts to a considerable quantity per day, the amount thereof being unknown to the defendant; that complainant enters into contracts with various coal operators along its line for the purchase of its necessary fuel coal; that the coal so purchased by complainant is used by it for the operation of its railroad; that no freight is assessed upon said coal; that no person or corporation excepting complainant has any title or interest in or to said coal after the same has been delivered to complainant at the mine tipple, and that complainant is not engaged in the purchase and transportation of coal for the purpose of selling the same to others or competing with any shippers or consignees of commercial coal.

IX.

Defendant admits that complainant has even during periods of car shortage, motive power, employes, tracks, sidings, switches, rights of way, and facilities other than cars, adequate to handle and transport all cars delivered to it for transportation; that at certain seasons of the year there is generally a shortage of cars, and that it is impossible for complainant to furnish various mines located along its line of railway sufficient cars for the transportation of commercial coal from said mines, creating what is known as a "car shortage," and that during such period it is impossible for complainant to furnish to all said mines from its available equipment sufficient cars to transport from said mines all of the coal desired by the operators of said mines to be transported therefrom.

X.

Defendant admits that complainant adopted rules for the distribution of cars at said coal mines along its lines during car shortage periods as set forth in circular No. 69, a copy of which is found in complainant's bill.

Defendant admits that under said rules of distribution complainant did not and does not count against any mine in its pro rata distribution of cars to such mines either the private cars owned by said

coal operators, the cars in which are transported said coal to and for said foreign railway companies, nor the cars used by complainant in transporting its own fuel coal.

52 Defendant avers that on or about the 15th day of August, 1907, complainant by its circular No. 70 cancelling said circular No. 69, established certain rules for the distribution of cars at coal mines, by which rules private cars belonging to the operators of said coal mines and cars furnished by said foreign railway companies for the transportation of coal to said foreign railway companies should be counted in the general distribution of cars to said mines by complainant and should be charged against or deducted from the number of cars to which the mines receiving said private cars and foreign railway fuel cars might be entitled in the general distribution of cars by complainant; but by said rule cars loaded with complainant's coal should not be counted against the mines loading them or charged against or deducted from the number of cars to which such mines might be entitled in the general distribution of cars by complainant. Said rules of car distribution as set forth in said circular No. 70 has never been used or enforced by complainant.

Defendant admits that on or about the 28th day of August, 1907, the Majestic Coal and Coke Company filed its bill of complaint in the Circuit Court of the United States for the Northern District of Illinois, seeking therein and thereby to restrain complainant from so charging private cars and foreign railway fuel cars against the

53 mines receiving them, and that in said cause said court made its order temporarily restraining and enjoining complainant from so charging or counting said private cars and foreign railway fuel cars, as more fully set forth in the copy of said order of injunction found in complainant's bill.

XI.

Defendant avers that prior to the adoption by complainant of the rules of car distribution set forth in said circular No. 70, or the filing of said bill of complaint by the Majestic Coal & Coke Company or the granting of said temporary injunction and restraining order, there had not been any petition or complaint filed with defendant against complainant in any way relating to or pertaining to the distribution of cars by complainant, nor had defendant made any investigation, finding, or order as to any rules of car distribution adopted, enforced, or to be enforced by complainant.

XII.

Defendant avers that on or about the 31st day of October, 1907, the Illinois Collieries Company filed with defendant a complaint against the complainant, under said act to regulate commerce, alleging and claiming that the distribution of cars by complainant under the

54 rules contained in said circular No. 69 (which since their adoption have been enforced by complainant), thereby unduly and

unjustly discriminated against the mines and operators of coal mines which did not receive said private cars, foreign railway fuel cars, and company fuel cars, and prayed that defendant might make an order that complainant desist from the violation of said act to regulate commerce.

A copy of said complaint marked "Exhibit A" is hereto attached and made a part hereof, the same being filed under the provisions of said act to regulate commerce heretofore referred to herein.

Thereafter a full hearing was had by defendant upon said complaint, at which said Illinois Collieries Company and complainant were represented by counsel, and defendant thereupon made its investigations, findings, and report upon said complaint under and in pursuance of the provisions of said act to regulate commerce, a full and true copy of the report, findings, and order of defendant therein being hereto attached marked "Exhibit B" and made part hereof.

Defendant avers that prior to the filing of said complaint by the Illinois Collieries Company, to wit, on the 11th day of July, 1907, in the cases of the Railroad Commission of Ohio et al. *v.* The Hocking Valley Railway Company and the Railroad Commission of Ohio et al. *v.* The Wheeling & Lake Erie Railroad Company,
55 defendant found that the practice of not counting and charging said foreign railway fuel cars and private cars against the mines receiving them resulted in undue and unjust discrimination on the part of said Hocking Valley Railway Company and Wheeling & Lake Erie Railroad Company, and said companies were by the order of defendant required to count and charge said foreign railway fuel cars and private cars against the mines receiving them in the general distribution of cars by such railroad companies respectively. A copy of the report, findings, and order of defendant in said proceedings is hereto attached, marked "Exhibit C" and made part hereof.

In view of the order of said defendant last referred to, counsel for complainant herein on the hearing before defendant and as representatives of complainant stated that they did not propose to argue the matters passed upon by defendant in said Hocking Valley Railway Company and Wheeling & Lake Erie Railroad Company cases and conceded for all purposes of that case (out of which this case arises) that foreign railway fuel and private cars are properly a part of the commercial equipment of a common carrier, and agreed that it is right and fair that said private and foreign railway fuel cars should be counted.

56 Defendant served complainant with the order on the complaint of said Illinois Collieries Company by mailing a copy thereof to the principal officers of complainant.

XIII.

Defendant denies that its said order on the complaint of said Illinois Colliers Company is unreasonable, unjust, oppressive, and unlawful, and avers that complainant's method of distributing cars

during car shortage periods under the rules contained in said circular No. 69 results in undue and unjust discrimination in violation of said act to regulate commerce and the acts amendatory thereof.

Defendant denies that said order of defendant in requiring complainant to take into consideration in its distribution of cars private cars owned by said mines and operators is unjust, unreasonable, or unlawful, but, on the contray, avers that if said private cars be not counted or charged against the mines receiving them that undue and unjust discrimination will result in violation of the act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that its said order requiring complainant to establish and put in force a practice of taking into consideration foreign railway fuel cars in the distribution of cars by complainant and to count said foreign railway fuel cars against the mines re-
57 ceiving them is unreasonable, unjust, oppressive, or unlawful, and avers that the allotment of said foreign railway fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution by complainant is a violation of said act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that its said order requiring complainant to count against the mines with which it has contracts for its fuel supply cars used by complainant in transporting its own fuel is unjust, unreasonable, and unlawful, or that by said order said defendant is attempting to regulate the manner and method of complainant conducting its business in matters which in no way relate to the public or its duties as a common carrier, or that said order deprives complainant of its lawful right to contract with said mines with reference to its necessary fuel supply, but on the contrary avers that the allotment of cars by complainant for its fuel supply in addition to the full distributive shares of the mines receiving such cars, in the general distribution of cars by the complainant, is an unjust, unreasonable, and unlawful discrimination in violation of the provisions of said act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that it has no jurisdiction under said act
58 to regulate commerce to make said order requiring complainant to count against the mines receiving them the cars used by complainant in transporting its own fuel supply, and that said cars do not enter into or affect the distribution of cars generally by complainant and the services and facilities rendered by complainant to the owners and operators of coal mines along its line of railroad.

XIV.

Defendant avers that the allotment by complainant of said foreign railway fuel cars, private cars, and complainant's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by complainant and the failure by complainant to count and charge said foreign railway

fuel cars, private cars, and company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(a) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

59 (b) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(c) That the operator receiving foreign railway fuel cars, private cars, or company fuel cars is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future reratings of such mine by complainant for the purposes of car distribution the mine would receive a higher rating and consequently a larger number of cars in complainant's general distribution of cars.

(d) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of miners and laborers.

(e) That the development of the mines which do not receive the foreign railway fuel cars, private cars, or company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accellerated.

(f) That by the arbitrary allotment of the foreign railway fuel cars, private cars, or company fuel cars the complainant and the so-called foreign railways are enabled to secure low prices on rail-

60 way fuel because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(g) That the operator of the mine receiving the foreign railway fuel cars, private cars, or company fuel cars is thereby enabled to make contracts for the delivery of coal distributed over a long period, to an extent that the operator of the mines which do not receive such cars can not do.

Defendant avers that the advantage to the operator of the mine receiving such foreign railway fuel cars, private cars, or company fuel cars in addition to the full distributive share of such mine in the general distribution of cars by complainant enables such operator to produce all of the coal produced by him, including coal for commercial shipments, at a cost of from 5 cents per ton to 20 cents per ton less than the cost of production to the operator who does not

receive such cars, such difference in the cost of production being dependent upon the district in which such mines are located and the relative number of arbitrary cars received at such mines.

Defendant avers that complainant and other railroads, including such foreign railroads, have been and are enabled to purchase their supplies of coal at prices from 5 to 20 cents per ton less than the prevailing market prices on commercial coal by reason of the
61 arbitrary allotment of such foreign railway fuel cars, private cars, or company fuel cars to the mines with which complainant or such foreign railroads may have contracts for their supplies of coal.

Defendant avers that by reason of the arbitrary allotment by complainant of such foreign railway fuel cars, private cars, or company fuel cars the mines receiving them are thereby enabled to produce their commercial coal at from 5 to 20 cents per ton less than the cost of production at the mines which do not receive such cars and thereby have an undue and unreasonable advantage over the operators of such mines which do not receive such cars in the marketing of their commercial coal.

Defendant avers that complainant and such foreign railways urge and insist upon the arbitrary allotment of such foreign railway fuel cars and company fuel cars in order that they may purchase their several and respective supplies of railway fuel coal at prices lower than the market prices on commercial coal.

Defendant avers that complainant as a common carrier and as such engaged in transportation and commerce between points in various States should, in the facilities and services rendered by it to the operators of coal mines on its line and in the distribution of
62 cars at such mines, not confer an advantage to the operators of certain of such mines to the disadvantage of the operators of other mines, and that as such common carrier it has no right in the distribution of cars to be loaded with its own fuel or fuel for foreign railroads to so distribute its available equipment as that in connection with the cars for such railway fuel the operator of the mine receiving them shall have the undue and unreasonable advantages hereinbefore set forth.

XV.

That this defendant, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, as to questions arising under the commerce acts, held by the courts to be an expert tribunal; that this defendant is also a quasi-judicial tribunal, and its conclusions in this case, and in all cases under said acts, are not the result of ex parte proceedings or investigations, but are the result of investigations strictly judicial; and that the conclusions of this defendant so arrived at are to be held

to be prima facie correct, and should not be set aside by the courts except in a clear case of error.

XVI.

That the burden is upon the complainants to show clearly to
63 the satisfaction of this court that the order of the Commission in question is erroneous and should not be enforced, and it is not sufficient to raise a mere doubt in the mind of the court; that the bill of complaint in this case does not set forth, or in any way make a part thereof, the report and opinion of this defendant or the evidence introduced on the hearing before this defendant and upon which the conclusions and order of this defendant are based, and does not allege or show that said order is not justified by the weight of said evidence; and that there is no allegation in the bill of complaint herein that the complainants have discovered or are prepared to adduce any new testimony or testimony in addition to that adduced before this defendant.

XVII.

This defendant denies all the material allegations of said bill of complaint inconsistent with the allegations set forth in the foregoing paragraphs of this answer from paragraph I to paragraph XV thereof, both inclusive, and now, having fully answered the said bill of complaint in so far as it is advised the same is material and necessary to be answered, denies that the complainant herein is entitled to the relief, or any part thereof, in said bill of complaint demanded, or any relief whatsoever, prays the same advantage of this, its answer therein, as if it had demurred to said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf wrongfully sustained.

THE INTERSTATE COMMERCE COMMISSION,
By L. A. SHAVER,
Solicitor for the Commission.

H. B. ARNOLD,
Special Counsel.

64 CHICAGO, STATE OF ILLINOIS, *ss:*

L. A. Shaver, being first duly sworn, says on oath that he knows the contents of the following answer and that the facts stated therein are true to the best of his knowledge, information, and belief.

L. A. SHAVER.

Subscribed and sworn to before me this the 11th day of June, A. D. 1908.

[SEAL.] WILLIAM A. SMALL,
Notary Public.

65 EXHIBIT A.

Interstate Commerce Commission.

ILLINOIS COLLIERIES COMPANY, A CORPORATION, COMPLAINANT,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION, DEFENDANT.

The petition of the above complainant respectfully shows:

(1) That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business at the city of Chicago, county of Cook and State of Illinois; that it is engaged in the business of mining and selling coal and is the owner of and possessed of and is operating several, to wit, eight coal mines in the State of Illinois; that the said Illinois Central Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business in the city of Chicago, county of Cook and State of Illinois, and is the owner of and is possessed of, using, and operating a railroad and many lines of railroad extending from the city of Chicago through said State
66 of Illinois and into and through the States of Wisconsin, Iowa, Minnesota, South Dakota, Missouri, Indiana, Kentucky, Tennessee, Mississippi, Alabama, and Louisiana, and is a common carrier of freights and passengers in the State of Illinois, Wisconsin, Iowa, Minnesota, South Dakota, Missouri, Indiana, Kentucky, Tennessee, Mississippi, Alabama, and Louisiana, and between the State of Illinois and each and all of said other States, that it issues through bills of lading and makes through rates of freight from points on its lines of railway in the State of Illinois to points in each and all of said States and many other States and Territories of the United States, and receives and transports shipments under through bills of lading and through rates of freight from points in all of said States and other points to points upon its line of railway in said State of Illinois, and thereby as such common carrier is subject to the provisions of the act of Congress entitled: "An act to regulate commerce," approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

(2) That the defendant unjustly discriminates against the owners and operators of coal mines upon its lines of railway engaged in shipping coal to points in other States, in this, to wit, that while the defendant from day to day distributes its available cars to be loaded with coal from mines along its line of railroad according to rat-
67 ings established by it as to the several and respective capacities of such mines, it does not in such distribution consider certain so-called "foreign railway fuel cars" furnished by foreign railroads to be loaded for account of such foreign roads, but delivers such foreign fuel cars to such mines without charging the same against the percentages or distributive number of cars to which such mines might be entitled under the aforesaid distribution, and at the same time fur-

nishes to such mines the full distributive shares of cars which the defendant allows to them under its method of distributing cars.

(3) That the defendant unjustly discriminates against the owners and operators of coal mines upon its lines of railroad engaged in shipping coal to points in other States, in this, to wit, that while defendant from day to day distributes its available cars as aforesaid, it does not in such distribution consider certain so-called "private cars" when placed at said mines, namely, cars owned or controlled by coal mine operators or owned or controlled by private persons, firms, or corporations, but delivers such private cars to such mines without charging the same against the percentage or distributive number of cars to which such mine might be entitled under the aforesaid distribution, while at the same time furnishing to such mines the full distributive shares which the defendant allows to them under its said method of distributing cars.

68 Wherefore, the complainant prays that the defendant be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the "act to regulate commerce;" that it be determined herein what shall be the proper method of distribution of said cars by defendant and the manner in which the same shall be deducted from the distributive shares of cars to which the mines receiving the same may be entitled; that the defendant be ordered to hereafter include in the number of cars available for distribution among said mines upon, along, and connected with its lines of railroad said "foreign railway fuel cars" and said "private cars;" that the defendant be ordered to cease and desist from maintaining and enforcing the present practice or regulation of failing or refusing to make any count of foreign railway fuel cars and private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators upon, along, and connected with its lines of railroad, but that said defendant be ordered and required to establish, maintain, and enforce a practice or regulation taking into consideration said foreign railway fuel cars and said private cars in determining the distribution of coal cars among the various coal operators along its lines of railroad on

69 interstate shipments of coal, and for such other and further order as the Commission may deem necessary in the premises.

Dated at Chicago, Illinois, this 28th day of October, A. D. 1907.

ILLINOIS COLLIERIES COMPANY,
By CASSODAY & BUTLER,
Its Attorneys.

CASSODAY & BUTLER,
Attorneys for Complainant,
314 Monadnock Block, Chicago, Illinois.

70 EXHIBIT B.

Before the Interstate Commerce Commission.

GLENN W. TRAER, RECEIVER OF THE ILLINOIS Collieries Company, *v.* CHICAGO & ALTON RAILROAD COMPANY. } No. 1294.

SAME *v.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMpany of Illinois. } No. 1295.

SAME *v.* ILLINOIS CENTRAL RAILROAD COMPANY. } No. 1317.

Submitted March 11, 1908. Decided April 13, 1908.

Cassoday & Butler for complainant.

Winston, Payne, Strawn & Shaw, and Garrad B. Winston for Chicago and Alton Railroad Company.

W. S. Kenyon for Illinois Central Railroad Company.

Philip Barton Warren for Chicago, Peoria and St. Louis Railway Company of Illinois.

Report and order of the Commission.

71 GLENN W. TRAER, RECEIVER OF THE ILLInois Collieries Company, *v.* CHICAGO & ALTON RAILROAD COMPANY. } No. 1294.

SAME *v.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY of Illinois. } No. 1295.

SAME *v.* ILLINOIS CENTRAL RAILROAD COMPANY. } No. 1317.

Submitted March 11, 1908. Decided April 13, 1908.

1. In establishing systems of car distribution, defendants have given the mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the systems established each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and

private cars are not charged against the distributive share of the mines to which they are assigned. Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners.

2. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

72 3. Fuel is necessary and essential to the operation of a railroad, and the right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded; but if a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities in such contract and have it upheld on the ground of compelling necessity.

4. In these cases the Commission is of the opinion that as to the privately owned or leased cars and the foreign railway fuel cars the rule laid down in Railroad Commission of Ohio *v.* H. V. Ry. Co., 12 I. C. C. Rep., 398, should apply, and that cars used by defendants upon their own lines for transportation of their own necessary fuel supply may be given in any numbers to the mine or mines from which such fuel supply is received, but if such mine or mines also ship commercial coal the fuel cars so supplied must be counted against the mine or mines.

Cassoday & Butler for complainant.

Winston, Payne, Strawn & Shaw, and Garrad B. Winston for Chicago & Alton Railroad Company.

W. S. Kenyon for Illinois Central Railroad Company.

Philip Barton Warren for Chicago, Peoria & St. Louis Railway Company of Illinois.

Report of the Commission.

Clark, *Commissioner:*

The complaint in each of the above cases was filed by the Illinois Collieries Company, but upon the appointment of the receiver for said company he was, upon petition, substituted as complainant in each case. The subject of the complaints is practically the same in

all three cases, and they were heard together upon record made in No. 1294 and are to be disposed of in one report.

The Illinois Collieries Company is a corporation with principal place of business in Chicago, Ill. It is engaged in mining and selling bituminous coal, and makes interstate shipments thereof over the lines of the defendants. Its mines are in Illinois and are located upon the lines of the Chicago & Alton Railroad Company and of the Chicago, Peoria & St. Louis Railway Company of Illinois. Its mine nearest to the line of the Illinois Central Railroad Company is 200 feet from the latter's right of way, and is served by that defendant through switching arrangements with the Wabash Railroad Company. Numerous mines of the character of those owned by the Illinois Collieries Company are located upon the lines of the respective defendants.

The several defendants have contracts for their own fuel supply with certain of the mines located on their respective lines.
73 Some of the mines have contracts to furnish foreign railways with coal and others have contracts with purchasers who furnish private cars for the transportation of such coal. Complainant sells its coal almost wholly in the open market, and each of its mines is dependent upon the defendant upon whose line it is located for cars to transport the output thereof. Complainant has no contracts for furnishing fuel coal to the defendants, and, except in a few instances, has not used foreign railway fuel cars nor private cars during the time covered by the complaints.

In establishing a system of car distribution the defendants have given the several mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the system established, each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive shares of the mines to which they are assigned. After the assignment of such cars to said mines, each is given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all. This permits these mines to ship a greater portion of their daily output than mines having the same tonnage rating but that do not have fuel contracts with the defendants nor the use of private or foreign railway fuel cars.

Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners; that the increased allotment to such mines makes a corresponding decrease in the cars to which complainant and the other mine owners would otherwise be entitled, and that their interstate shipments of coal are to the extent of that decrease thus restricted.

The failure to count the defendants' fuel cars against the mines to which they are delivered was not specified in the complaint against the Illinois Central Railroad Company, but in brief and on argu-

ment it says that the question is one of great importance to it. At the time of the filing of this complaint the circuit court of the United States for the northern district of Illinois had enjoined the said defendant from counting foreign railway fuel cars and private cars against the mines to which they were assigned. The question of the Commission's jurisdiction of discriminatory practices, in the light of the decision of the Supreme Court in Texas & Pacific Railway Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426, was decided by the Commission in Railroad Commission of Ohio *v.* H. V. Ry. Co., 12 I. C. C. Rep., 398.

74 Defendants in their briefs concede that the prior holding of the Commission, in Railroad Commission of Ohio *v.* H. V. Ry. Co., supra, eliminates the question of counting private cars and foreign railway fuel cars in the distribution, and that the question of counting the cars used for the defendants' own fuel is really the only question presented for determination. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

The Chicago & Alton Railroad Company has 360 hopper-bottomed gondola cars which it says are used solely for its own fuel, and which, because no shipper on its line has trestle from which to unload them, are not only inconvenient but impracticable for commercial use.

Complainant in these cases presents the following illustration, and argues that such a practice is unjustly discriminatory: A carrier offers to contract with two mines for 500 tons of coal per day, dividing the amount equally between them. The mines are each of 1,000 tons daily capacity. One mine accepts the contract, the other does not, and in turn the carrier gives the remaining portion of the contract to the first mine. The carrier has thus offered to the two mines a market created by itself; one mine has accepted the market so offered and the other has not. This leaves one mine with 500 tons of coal sold in a special market and 500 tons to find a common market, and the other has 1,000 tons to find a common market. The handling of the 500 tons sold to the carrier by the contracting mine requires the equipment of the railroad. The carrier can furnish cars for but 1,000 tons. It says it must have 500 tons for its necessary use, and sends the cars for that amount to the contracting mine. This leaves available cars of 500 tons capacity, in the distribution of which it says that it will not count the 500 tons that have been given to the contracting mine, but that it will divide the remaining cars on the basis of 1,000 tons rating for each mine, thus permitting the contracting mine to dispose of three-fourths of its output and the other only one-fourth.

The carrier says it is justified in doing this because the first mine has made a contract with it to furnish it coal, which it must of necessity have in order to operate, and as an inducement to such mine to make this contract it does not charge to that mine the number of cars necessary to handle the 500 tons sold to the carrier, and, in further consideration, permits said mine to enjoy the same
75 proportional share in the remaining cars available for distribution as if it had not sold any coal to the carrier.

If two mines of equal daily capacity are located on the line of a carrier, and one sells its entire daily output locally and the other does not sell any locally, but its entire output must find some other market, it is clear that, although the capacities of the mines are the same, and each would be entitled to the same percentage of cars if they were both offering their output to the company, the one would not be entitled to a rating because it would tender no coal and the other would be entitled to the equipment of the company for that day, and if it was sufficient to move its output, both mines would be on an equality, so far as the selling of their output is concerned. But if one mine sells one-half of its output locally and the other none at all, and the carrier has only enough cars to transport one-half the combined output of the two, it would be unfair for the carrier to rate the mine selling one-half of its output locally at the same tonnage as the other mine and give to it one-half of the cars that it had on a given day.

If a carrier assigns to or uses for the transportation of its own fuel supply only such part of its equipment as is reasonably necessary therefor, it may be asked what difference can it make to the shippers along its line whether those cars go to the mine or mines owned by the carrier or to one or more mines with which the carrier has contracts for coal? The shipper who has no fuel contract answers this by saying that when one mine has such contract with carrier and is furnished cars under it without having its distributive share of cars for commercial shipments reduced thereby, such mine is given an advantage over its competitor that has no contract with the carrier, because it is enabled to work its mine more regularly and thus to keep its property in a more efficient condition—to retain its employees and thus to operate more economically and to sell its output more advantageously in the commercial market. To this the carrier and the shipper who has fuel contract with the carrier retort: "You were given an opportunity to take a contract upon the same terms and declined to do so."

Products offered a carrier for shipment in a given locality are usually tendered because the volume produced is in excess of that consumed in the local market. The object of the transportation requested is to get the surplus to a market of consumption. It is the duty of the carrier, so far as it is in its power, to furnish the means of getting that output either from the mills or from the mines to the market.

That it is the duty of a common carrier to furnish means of transportation and to furnish them alike for all that are similarly situated

the Commission has repeatedly held: Richmond Elevator Co.
76 v. P. M. R. R. Co., 10 I. C. C. Rep., 629; Eaton v. C. H. & D. Ry. Co., 11 I. C. C. Rep., 619; Railroad Commission of Ohio v. H. V. Ry. Co., supra; Powhatan Coal & Coke Co. v. N. & W. Ry. Co., 13 I. C. C. Rep., 69.

One industry may not be built up by granting to it transportation privileges which are denied to and which work an unreasonable disadvantage against another industry. All must bear their just proportion, according to circumstances and conditions, of any disadvantage that may arise from insufficiency of facilities resulting from causes which are beyond the carrier's control.

It appears that the defendant, the Chicago & Alton Railroad Company, applied its system of car distribution and ratings thereunder to three mines not located on its lines, but which it reached through switching connections with other railways. Said defendant had no fuel contracts with them, but during the months of September, October, and November, 1907, it furnished cars to said mines under their respective ratings, for the transportation of approximately 130,000 tons of commercial coal. Defendant, the Illinois Central Railroad Company's line, does not reach complainant's mines at Litchfield, although it gives such mines a rating. It does not appear that it furnished cars to these mines.

Unless for the purpose of securing its own fuel supply it is neither right nor proper for a carrier to send its cars for loading at mines that are not located upon its lines at times when it could only supply the demand for cars from mines that are located upon its line, perhaps wholly dependent upon it for both cars and transportation. Such a practice necessarily intensifies an existing inability on part of the carrier to meet the demands of shippers who are dependent upon it and who have a right to rely upon its performance of its duty as a common carrier, and it curtails the already-restricted opportunities of the mines that can secure neither cars nor transportation from any other carrier.

The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. In fact, its first duty is to such shippers. See Memphis Freight Bureau v. Ft. S. & W. R. R. Co., 13 I. C. C. Rep., 1. It may not be compelled to nor may it voluntarily divert its equipment from its own line to shippers on another line when to do so would deprive its local shippers of needed equipment. A carrier may, of course, send its equipment from its line for the things that are necessary and essential for its own operation. This right arises from considerations of public policy which recognize the duty of a carrier to operate its line, and the diverting of its equipment in that instance is predicated on necessity. It is not an inherent right that is grounded on private contract. The limit
77 of this right is measured by the extent of the necessity; it can not go beyond that.

Fuel is as necessary and essential to the operation of a railroad as are rails, roadbed, and other equipment. Without it a carrier

could serve no one. The right of a carrier to own mines for its fuel supply is conceded in the law. The right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded, as must also the right to utilize its facilities in providing and transporting those materials and supplies that are essential to the operation of its lines. In fact, a carrier must arrange in advance, by ownership or contract, for its fuel supply. Otherwise its ability to perform its functions would be as uncertain as its fuel supply. For that reason a carrier may contract for its fuel supply, and in so far as the contract is not opposed to public policy or in conflict with the statutes or the rules of law announced by the courts, it must be regarded as any other private contract. Any contract of lawful subject-matter, regardless of the character of the parties, is made with reference to the law applicable thereto, and all principles of public policy involved therein, the statutes and the decisions of the courts relating thereto become as effectually a part of the contract as if they had been expressly referred to therein. If a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy, they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities into such contract and have it upheld on the ground of compelling necessity. Public policy has never permitted a carrier to procure its operating necessities by means of illegal contracts. The substance may be legally subject to contract, but the form of that contract must not be subject to illegal infirmities.

A carrier may lawfully get the coal that it needs so long as it does not violate the rights of or fail in its duty to the public. It must make this contract as it must make all others, keeping in view its duty to perform its public functions and to avoid injury or damage to its shippers by reason of unjust discrimination, undue preference, or unreasonable disadvantage growing out of such contract or the performance thereof. If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof. As before observed, however, this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel. But if a carrier had a contract
78 for more cars of fuel per day than it needed, neither such contract, nor considerations of public policy which recognize the public necessity for fuel, would justify it during a period of car shortage in using its equipment for a superfluous supply when such equipment was demanded and needed by the shippers and the public.

It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers. Generally speaking, this inability so far as coal shipments are concerned prevails during

about four or five months of the winter season, when the demand for coal is greatest and the prices of coal the highest. During the other portion of the year carriers generally have a surplus of idle coal cars.

In Railroad Commission of Ohio v. H. V. Ry. Co., supra, the Commission held that privately owned or leased cars and cars of foreign railways sent for foreign railway fuel must be assigned to the parties by whom owned or leased, or to whom consigned, but that all such cars must be counted against the distributive shares of such parties. Any other holding would open the door to unjust discrimination between shippers of commercial coal, for it must be remembered that cars of foreign railway fuel are commercial shipments in so far as the carrier transporting them for another carrier is concerned. Such shipments may not be given discriminatory or preferential rates.

The transportation by a carrier of its own fuel over its own lines presents a somewhat different question. Conditions and circumstances vary in different localities, but where a carrier contracts for fuel coal with certain mines located on its lines and served by it, which also compete with other mines similarly located, in the sale of commercial coal, the carrier may not unjustly discriminate in favor of the mine that accepts its proffered contract and thus work undue prejudice against the mine that does not accept such contract. Conceding fully the right of the carrier to use its equipment for the purpose of securing its own fuel supply, even though shippers at the same time desire the use of that equipment, and conceding the right of the carrier to secure its fuel supply either from mines which it owns or those whose entire output it purchases, we are led to the conclusion that where a carrier purchases a portion of the output of a mine which is competing with other mines on its lines in commercial markets it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In these cases we think that as to privately owned or leased cars and foreign railway fuel cars the rule laid down in Railroad Commission of Ohio v. H. V. Ry. Co., supra, should apply. We
79 think that the Chicago & Alton Railroad Company has a right to confine the hopper-bottomed cars referred to to the hauling of its fuel supply, but that they, together with all other cars used by the defendants upon their own lines for transportation of their own fuel supply, should be counted against the distributive share of the mine or mines to which given, except in cases where the carrier owns or purchases the entire output of the mine for its fuel supply.

An order will be entered accordingly.

80 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

GLENN W. TRAER, RECEIVER OF THE ILLINOIS Collieries Company, *v.* CHICAGO & ALTON RAILROAD COMPANY.	No. 1294.
SAME *v.* CHICAGO, PEORIA & ST. LOUIS RAILWAY Company of Illinois.	No. 1295.
SAME *v.* ILLINOIS CENTRAL RAILROAD COMPANY.	No. 1317.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company
81 of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

It is further ordered, that said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it,

and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars.

82 EXHIBIT C.

Before the Interstate Commerce Commission.

RAILROAD COMMISSION OF OHIO ET AL.
v.
HOCKING VALLEY RAILWAY COMPANY. } No. 1008.

RAILROAD COMMISSION OF OHIO ET AL.
v.
WHEELING & LAKE ERIE RAILROAD COMPANY. } No. 1009.

Submitted June 29, 1907. Decided July 11, 1907.

W. H. Ellis, attorney-general of Ohio, H. B. Arnold, R. J. Mauck, and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan, and W. N. Duncan for defendants.

Report and order of the Commission.

83 THE RAILROAD COMMISSION OF OHIO ET AL.
v.
THE HOCKING VALLEY RAILWAY COMPANY. } No. 1008.

THE RAILROAD COMMISSION OF OHIO ET AL.
v.
THE WHEELING & LAKE ERIE RAILROAD COMPANY. } No. 1009.

Submitted June 29, 1907. Decided July 11, 1907.

Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of

defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so-called "private" cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such "private" and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are
84 necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

W. H. Ellis, attorney-general of Ohio; H. B. Arnold, R. J. Mauck, and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan, and W. N. Duncan for defendants.

Report and Order of the Commission.

Clark, *Commissioner:*

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The attorney-general of the State appeared for the complainants. Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the Commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly discriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company, it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway companies, and that while it has not adequate equipment of its own, it has loaned, leased, and furnished cars to the latter company.

In the complaint against the Wheeling & Lake Erie Railroad Company, it is stated that certain so-called "private" cars, claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

Paragraph III of the complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad
85 companies so sending the cars have contracts for the furnishing of fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies, not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that because of that threat and because of the fact that competing roads were not at that time so counting such cars in distribution it ceased to count them; that on or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against the mines

to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent to those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the Railroad Commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which owns
86 nearly all of the stock of the Sunday Creek Company and the Wheeling and Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake Erie Coal Company. It can not be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

Since this case was argued the complications have been relieved by the railroad commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tipple of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial portion of the year it has a large number of idle cars; for the greater portion of the year it is able to provide all the cars needed; but for four or five months in the year it is unable to meet the maximum demand of

shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated, favoritism in the sending of the Hocking Valley Railway's cars to the K. & M. road is alleged, on the ground that many mines of the Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The K. & M. is in substance
87 and effect a part of the Hocking Valley system. In its annual report to this Commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley System through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(a) System cars, which include cars owned by the defendant, or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

"(b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

"(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular

coal companies, is involved. These are the cars included in class (c) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about $150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases, and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second-lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price advanced
88 by the coal companies, which second-lien car-trust certificates were accepted by the coal companies in return for their cash payments, and by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of the mines of the coal companies. Assuming, therefore, that the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company. It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal Mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business, and some question as to the jurisdiction of this Commission is suggested. The testimony shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve

endless work and expense. In the case of the Steamer Daniel Ball v. U. S., 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

In the case of the Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S., 426, the court held—

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable."

89 In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the Commission and makes it its duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this Commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of questions of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the Commission has no power to regulate the distribution of cars, and in this connection reference is made to the Commission's decision in the case of Mason v. C., R. I. & P. R. Co.,

12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the Commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the Commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the Commission, it has undoubted power and jurisdiction to deal with complaint that the practices of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the Commission and that of a court of equity.

90 In Johnson Coal Mining Co. v. Hocking Valley Ry. Co., 14 Ohio, Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary, or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the distribution, to work his mines more economically, more nearly to their full capacity, and more steadily. He can therefore afford to sell the fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage

of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion of available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United States ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., in which the coal
91 company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant did not count the private cars or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary, it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate-commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever.

"The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"These regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employees of the railroad company and must lessen the facilities in that respect of the independent operators. Indeed, an objection of the railroad company to individual ownership of cars is that they require special

switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate-commerce act. The mine operator would, in any state of the car supply, continue to get the exclusive use of his individual cars as before, but when the
92 supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region.

* * * * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore & Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore & Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate-commerce act would permit these cars, now the property of the railroad company, to be taken out of its distributable car supply.

* * * * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car-supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of the exclusive use of their individual cars, but the individual cars assigned by the owner

to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they are not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Logan Coal Company v. Pensylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the dis-
93 tribution. The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to discontinue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were so consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

"All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be performed consistently with this paramount requirement of equal treatment to all. * * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown, this enables the relator to ship somewhat more of its daily output than a competitor who only receives the use of company cars. * * * It is true the defendant

company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous-coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable to do, and it seems to me that when an operator elects to avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate-commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company. * * *

94 "What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of Pennsylvania as to the propriety of counting the foreign railway fuel cars in the distribution of equipment are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of

the act to regulate commerce and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the Commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private" cars for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

It is to be noted that the recommendation of the Commission refers to "private" or "individual" cars in fact; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they were not intended, as seems to have been contemplated by the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars
95 is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions which require

carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assignment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all will be on an equality, and the effect can not be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This Commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In Rice, Robinson & Witherop v. W. N. Y. & P. R. Co., 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

96 It is admitted that the cars so held under lease are devoted to the exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal-mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of $150,000 in cash, for which, in a comparatively short period, they received an equivalent amount of interest-bearing car trust certificates. Assuming that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals, to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided

for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

ORDER.

Upon the foregoing report—

It is ordered, that the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

It is further ordered, that said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation
97 taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal; and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called p.ivate cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

(Endorsed:) Filed June 11, 1908. H. S. Stoddard, clerk.

98 And on to wit, the twenty-ninth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain opinion in the words and figures following, to wit:

Opinion.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

CHICAGO AND ALTON RLD. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } No. 29115. In equity.

ILLINOIS CENTRAL RLD. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } No. 29116. In equity.

Before Grosscup, Baker, and Kohlsaat, circuit judges.

These causes are substantially alike and were submitted together for final decree upon the bill and answer.

Complainants are interstate common carriers. Along the line of each in Illinois are mining districts within which the operators are dependent upon one or the other of these carriers to get to market their product in excess of local consumption.

Following are the classes of cars involved: (1) Coal cars owned by complainants and used by them in hauling coal for shippers generally; (2) private cars owned by coal mining companies or
99 by their customers and used in conveying coal from the mines to the customers; (3) fuel cars owned by foreign railroads and used on complainants' roads in hauling coal from the mines to the delivery points for the foreign railroads; (4) fuel cars owned by complainants and used by them in carrying coal from the mines to their own coal chutes. Complainants purchase no coal except for their own use.

The greater part of the year there is more equipment at hand than there is coal to haul. But during the winter months a car shortage generally occurs. Prior to April 13, 1908, complainants were accustomed to deal with a shortage of coal cars in this way: They rated each mine according to the relation its average producing capacity bore to the average producing capacity of the district in which it was located, and they distributed to each mine its pro rate share of the available equipment of class one, above enumerated; but they did not count or in any way take into consideration the available equipment of classes two, three, and four.

On April 13, 1908, the Interstate Commerce Commission, in a proceeding duly pending, made the following order: "It is ordered that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, noti-

fied and required, on or before the first day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or
100 regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

"It is further ordered that said defendants be, and they severally are hereby, notified and required to establish, on or before said first day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other
101 said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given, in addition thereto, a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

Complainants, contending that their method of distribution is right, ask to have the enforcement of the Commission's order enjoined.

The Commission's report is found under the title of Traer v. Chicago & Alton Rld. Co. et al., 13 I. C. C. Rep., 541. Other cases bearing upon the questions herein involved are Ry. Com. of Ohio et al. v. Hocking Valley Ry. Co. et al., 12 I. C. C. Rep., 398; U. S. ex rel. Pitcairn Coal Co. v. B. & O. Ry. Co., 154 Fed., 108; Logan Coal Co. v. Pa. Ry. Co., 154 Fed., 497.

BAKER, Circuit Judge, delivered the opinion of the court:

I. The so-called private cars.

A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no
102 vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business.

Where Federal authority exists it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local
103 constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

II. Fuel cars of foreign railroads.

The fact that these railroads are themselves common carriers has nothing to do with the case. Here they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment.

III. Fuel cars of complainants.

Coal is bought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel.

But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate com-
104 merce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operator's local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine. And we perceive no just ground for a difference, if the mine's diminished capacity comes from the carrier's act. While the carrier's cars that are being employed in hauling its own fuel are not a part of the available commercial equipment, yet the diminished capacity of the mine to tender coal for transportation in commerce should be taken into consideration, and computing the average number of the carrier's own fuel cars set out at a mine may be the easiest and surest way of gauging that mine's diminished capacity.

In our judgment complainants are not entitled to relief against that part of the order which requires them to count the so-called private cars and the fuel cars of foreign railroads as available commercial equipment. But they are each entitled to an injunction against the enforcement of that part of the order which commands them to count their own cars that are being employed in hauling their own fuel as available commercial equipment, and
105 against their being compelled to take such fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce.

Decrees will be entered accordingly.

(Endorsed:) Filed June 29, 1908. H. S. Stoddard, clerk.

106 And afterwards, to wit, on the thirtieth day of June, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause

before the Hon. Peter S. Grosscup, circuit judge, appears the following entry, to wit:

Decree of June 30, 1908.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION. } 29116.

This cause coming on to be heard at this term of court, and being submitted for final decree upon bill and answer to Circuit Judges Grosscup, Baker, and Kohlsaat, the court, having heard argument of counsel and being now fully advised in the premises, finds that the complainant is entitled to the relief asked in its bill as to those parts of the order of the defendant relating in any way to the use or counting of cars for complainant's own fuel and is not entitled to the other relief asked for and the same is denied.

It is ordered, adjudged, and decreed as follows: That the said Interstate Commerce Commission, its members, their agents, servants, and representatives, should be, and the same are, perpetually enjoined and restrained from enforcing and from taking any steps or taking any proceedings towards the enforcement of that part of said order of said Interstate Commerce Commission which commands said complainant on or before the first day of July, 1908, to cease and desist and during a period of at least two years thereafter to abstain
107 from failing or refusing to make any count of its own fuel cars that are being employed in handling its own fuel in the distribution of coal cars among the various coal operators along its line, and also that part of said order of said Interstate Commerce Commission requiring said complainant to establish on or before said first day of July, 1908, and during a period of at least two years thereafter, to maintain and enforce a practice or regulation taking into consideration cars used for its own fuel supply in determining the distribution of coal cars among the various coal operators along its line, and all other parts of said order determining and prescribing a method of use or counting of cars employed by said complainant in handling its own fuel.

108 And afterwards to wit, on the ninth day of July, 1908, come the Interstate Commerce Commission by Edwin W. Sims, district attorney for the United States for the Northern District of Illinois, and filed in the clerk's office of said court its certain petition for appeal in words and figures following to wit:

Petition for appeal.

THE ILLINOIS CENTRAL R. R. CO., complainant,
vs.
INTERSTATE COMMERCE COMMISSION, defendant. } In equity. No. 29116.

Petition for appeal.

The Interstate Commerce Commission, being a bureau or department of the Government of the United States, by Edw. W. Sims,

district attorney of the United States for the Northern District of Illinois, being thereunto duly authorized, represents that in the decree or order of said Circuit Court, in the above-stated case, rendered on the 30th day of June, 1908, there is manifest error to its injury, and, therefore, prays for an order granting an appeal from said decree to the Supreme Court of the United States.

EDWIN W. SIMS,
District Attorney of the United States
for the Northern District of Illinois.

(Endorsed:) Filed July 9, 1908. H. S. Stoddard, clerk.

109 And on the same day to wit, the ninth day of July, 1908, come the Interstate Commerce Commission by its attorney and filed in the clerk's office of said court its certain assignment of errors in words and figures following to wit:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

THE ILLINOIS CENTRAL R. R. CO., complainant, *vs.* INTERSTATE COMMERCE COMMISSION, defendant,	In equity. No. 29116.

Assignment of errors.

And now comes the Interstate Commerce Commission, by Edw. W. Sims, district attorney of the United States for the Northern District of Illinois, and charges that in the decree rendered by said Circuit Court for said district in the above-entitled cause on the 30th day of June, 1908, and in the record and proceedings therein there is manifest error to its injury in this, to wit:

1. Said court erred in not dismissing the bill of complaint for want of equity.

2. Said court erred in not dismissing said bill because there is no allegation therein that irreparable injury will result from the failure to enjoin the enforcement of the order in question and no facts are alleged showing, or tending to show, that such injury will or can result therefrom.

3. Said court erred in not dismissing said bill because there is not set forth therein, or made a part thereof as an exhibit, the report and opinion of the Commission stating the grounds upon which it based the order in question.

110 4. Said court erred in not dismissing said bill on the allegations and denials of the answer of the Interstate Commerce Commission, and particularly the allegations marked "a," "b," "c," "d," "e," "f," and "g" in paragraph XIV of said answer.

5. Said court erred in holding that the complainant was "entitled to an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands it to count its own cars that are being employed in hauling its own fuel as available commercial equipment."

6. Said court erred in granting an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands the Illinois Central Railroad Company "to count its own cars that are being employed by it in hauling its own fuel as available commercial equipment."

7. Wherefore, the Interstate Commerce Commission prays that so much of the decree of the Circuit Court herein as enjoins that part of the order of said Commission which requires the said railroad company to count its own fuel cars employed in hauling its ov n fuel as available commercial equipment, rendered on the day of , 1908, be reversed, and that said Circuit Court be ordered to enter a decree dismissing the petition or bill filed in the above-entitled cause in said court by the said railroad company against said Interstate Commerce Commission.

EDWIN W. SIMS,
District Attorney of the United States for the Northern District of Illinois.

(Endorsed:) Filed July 9, 1908. H. S. Stoddard, clerk.

111 And on the same day, to wit, the ninth day of July, being one of the days of the regular July term of said court, 1908, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to wit:

Order of July 9, 1908, allowing appeal.

THE ILLINOIS CENTRAL R. R. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } 29116.

In this cause the Interstate Commerce Commission, by Edw. W. Sims, district attorney of the United States for the Northern District of Illinois, thereunto duly authorized, having made its application in writing for an appeal from the decree therein, rendered on the 30th day of June, 1908, to the Supreme Court of the United States, and the said Interstate Commerce Commission, being a bureau or department of the Government of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of

$5,000, exclusive of costs, it is, therefore, ordered that said appeal be, and the same is, hereby granted and made returnable on the ninth day of August, 1908.

112 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION. } 29116.

To the clerk of the above entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States, at Washington, under the appeal heretofore perfected to said court and include in the said transcript the following pleadings, proceedings, and papers on file, to wit:

Bill of complaint, filed June 1, 1908.

Affidavits of C. F. Parker, N. B. Morrison, and O. S. Keith, filed June 11, 1908; notice to Attorney-General, filed June 11, 1908; certificate of Attorney-General, filed June 8, 1908.

Answer of Interstate Commerce Commission, filed June 11, 1908.

Opinion, filed June 29, 1908.

Decree entered June 30, 1908.

Petition for appeal, filed July 9, 1908.

Assignment of errors, filed July 9, 1908.

Order entered of record July 9, 1908, allowing appeal.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Indorsed): Filed July 24, 1908. H. S. Stoddard, clerk.

113 NORTHERN DISTRICT OF ILLINOIS, *Eastern Division, ss:*

I, H. S. Stoddard, clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court made in accordance with praecipe filed in the cause entitled Illinois Central Railroad Company *vs.* Interstate Commerce Commission, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Chicago, in said district, this twenty-fourth day of July, 1908.

[SEAL.] H. S. STODDARD, *Clerk.*

114 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

THE ILLINOIS CENTRAL R. R. CO., COMPLAINANT,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.
} In equity. No. 29116.

Citation on appeal.

The United States of America, Seventh Judicial Circuit.

The President of the United States, to the Illinois Central Railroad Company or to W. S. Kenyon, its solicitor of record, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office, in the United States Circuit Court for the Northern District of Illinois, in the cause, wherein the Interstate Commerce Commission was defendant and said Illinois Central Railroad Company was complainant, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Hon. P. S. Grosscup, U. S. circuit judge for said Seventh Judicial Circuit, this the 9th day of July, in the year of our Lord one thousand nine hundred and eight.

P. S. GROSSCUP,
Circuit Judge.

Service of the above citation accepted this 10 day of July, 1908.

ILLINOIS CENTRAL R. R. CO.,
By J. M. DICKINSON,
Its General Counsel.

(Indorsement on cover:) File No. 21298. N. Illinois C. C. U. S. Term No. 502. The Interstate Commerce Commission, appellant, *vs.* The Illinois Central Railroad Company. Filed August 11th, 1908. File No. 21,298.

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Office Supreme Court, U. S.
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CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*	No. 232.
INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*	No. 233.

MOTION

ON BEHALF OF HORACE LOWRY, C. E. WALES AND J. L. D. SPEER, AS RECEIVERS OF THE ILLINOIS COLLIERIES COMPANY.

ELDON J. CASSODAY,
RUSH C. BUTLER,
Solicitors for said Receivers.

CASSODAY & BUTLER,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant*, *vs.* THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*	No. 501.
INTERSTATE COMMERCE COMMISSION, *Appellant*, *vs* ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*	No. 502.

MOTION.

Now come Horace Lowry, C. E. Wales and J. L. D. Speer, as Receivers of the Illinois Collieries Company, and move the court for leave to file a brief in the above entitled causes and to participate in the oral argument thereof, and respectfully shows to the court:

That on October 31, 1907, the Illinois Collieries Company filed its separate complaints before the Interstate Commerce Commission against the Chicago & Alton Railroad Company and Illinois Central Railroad Company, respectively, complaining that these companies were unjustly discriminating in their method of dis-

tribution of coal cars to the several mines along their lines of railroad; that afterwards Glenn W. Traer, was appointed as Receiver of the Illinois Collieries Company by the Circuit Court of Sangamon County in the State of Illinois and was substituted as complainant in each of said cases; that a hearing was afterwards had and the Interstate Commerce Commission entered an order in each case requiring said companies to desist from their method of distribution by which they failed to count against the mines receiving them private cars, foreign railway cars and cars sent to such mines for the companies' own fuel supply, and ordering and directing each of said companies to count said cars against the mines receiving them after the first day of July, 1908; that on June 1, 1908, each of said companies filed a bill for an injunction against the Interstate Commerce Commission in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in and by which it sought to enjoin the Interstate Commerce Commission from enforcing said order; that the order sought to be enjoined was the order obtained by said Glenn W. Traer, Receiver, as complainant in said proceeding before the Interstate Commerce Commission; that although said Glenn W. Traer, as such Receiver, had obtained said order and was deeply interested in its validity and enforcement and although his rights were directly affected by and involved in said proceedings in said Circuit Court he was not made a party to said proceedings and had no opportunity either by himself or through his solicitors to be represented or heard upon the hearing of said cause; that after hearing arguments the said court granted an injunction against the

enforcement of a part of said order by the Commis sion, and the said Commission thereupon appealed to this court, which appeal is now pending as by the rec ords of this court will more fully appear.

Your petitioners further show that afterwards Glenn W. Traer resigned as such Receiver, said resignation becoming effective December 1st, 1908, and your petitioners were by order of said Circuit Court of Sangamon County, Illinois, appointed as Receivers of said Illinois Collieries Company and qualified and entered upon the duties of their office on said date, since which time they have been and still are acting as such Receivers.

Your petitioners further show that the part of said order of the Commission so enjoined is the part of most importance to them and the part which most vitally affects their interests and the interests they represent, and that in said proceeding, while the said Interstate Commerce Commission is a necessary and proper party, they are the real parties in interest.

HORACE LOWRY,
C. E. WALES and
J. L. D. SPEER,
As Receivers of the Illinois Collieries Company.

ELDON J. CASSODAY,
RUSH C. BUTLER,
Solicitors for said Receivers.

SUGGESTIONS IN SUPPORT OF MOTION.

In support of the above motion we desire to call to the attention of the court the importance of the issues presented for decision in these cases. That they are of "general public importance" is shown by the certificates of the Attorney General filed in the Circuit Court. (Transcript in Alton case, p. 12; in Ill. Cent. case, p. 23.) There is here involved the validity of the practices of the railroad companies as to distribution of coal cars; the power of the Interstate Commerce Commission to regulate such practices under the Act to Regulate Commerce; the construction of certain sections of such Act; whether cars used to haul company fuel coal are engaged in interstate commerce and whether the practices in regard to them have such an effect upon the distribution of cars which *are* engaged in such commerce as to be governed by the Act to Regulate Commerce.

The decision of this Honorable Court as to the validity or invalidity of the practice in question and as to the authority of the Commission will be of great and far reaching importance and will affect every coal mine operator and every coal carrying railroad in this country.

We respectfully ask that we may be allowed to file a brief and participate in the oral argument of these cases.

ELDON J. CASSODAY,
RUSH C. BUTLER,
Solicitors for Horace Lowry, C. E. Wales and J. L. D. Speer, as Receivers of the Illinois Collieries Company.

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OCTOBER TERM, 1908.

IN THE

Supreme Court of the United States

No. [redacted]. 232.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY,
Appellee.

No. [redacted]2. 233.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF THE DECREES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

WAYNE MacVEAGH,
McKENNEY & FLANNERY,
Solicitors.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Interstate Commerce Commission, Appellant,	
vs.	No. 501.
The Chicago & Alton Railroad Company, Appellee.	
Interstate Commerce Commission, Appellant,	
vs.	No. 502.
The Illinois Central Railroad Company, Appellee.	

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF THE DECREES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

The Pennsylvania Railroad Company prays that an order may be made by this Honorable Court permitting it to file a brief in the above entitled

cases, and respectfully represents to the Court as follows:

That it is a Railroad Company engaged in interstate commerce, and is a transporter of large quantities of coal from various points in the State of Pennsylvania to points in other states.

That in the management and conduct of such business it is required to make distribution of coal cars to and among the various shippers of coal whose mines are located upon its lines, and in periods of car shortage the allotment made is in accordance with the following rule or regulation established and promulgated by it:

> "Commencing January 1st, 1906, assigned "cars, *i. e.*, cars for Pennsylvania Railroad "fuel supply, foreign railroad cars specially "consigned for the fuel supply of railroads "consigning such cars, and individual cars "assigned by the owners to specified mines for "loading, will be charged against the capacity "of the mines at which they are placed. The "difference between the rated capacity of a "mine and the capacity of the assigned cars "placed for loading will be the rated capacity "on which all other cars will be prorated."

That the method of making distribution of cars provided for in the above rule or regulation has been followed by your Petitioner since January 1st, 1906.

That the Appeals in the above entitled cases bring before this Court for review decrees made by the Circuit Court of the United States for the Northern District of Illinois, which, in effect, determined that the correct method of ascertaining the number of cars which should be delivered to a shipper of coal for his own shipments at whose mines the carrier had placed cars of its own to be loaded with coal intended for its own fuel supply, was that which the above recited rule or regulation of your Petitioner contemplates and provides for.

Your Petitioner, therefore, is interested in the determination of the question involved in these cases, and because of such interest is desirous of presenting a brief in support of the decrees entered by the Court below.

And it will ever pray, etc.

THE PENNSYLVANIA RAILROAD COMPANY,
By
JOHN P. GREEN,
Vice President.

WAYNE MACVEAGH,
MCKENNEY AND FLANNERY,
Solicitors for Pennsylvania Railroad Co.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*
No. 232.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*
No. 233.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

MOTION.

F. S. WINSTON,
Solicitor for The Chicago & Alton R. R. Co.

W. S. KENYON,
Solicitor for The Illinois Central R. R. Co.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*	No. 501.
INTERSTATE COMMERCE COMMISSION, *Appellant.* vs ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*	No. 502.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

MOTION.

Now come The Chicago & Alton Railroad Company and The Illinois Central Railroad Company, appellees, and move the court to advance these causes and set these causes down for an early hearing.

In support of such motion these appellees respectfully show:

1. That these causes were brought in the Circuit Court of the Northern District of Illinois to enjoin an

order of the Interstate Commerce Commission in accordance with the provisions of paragraph 16 of the Act to Regulate Commerce, approved February 11, 1887, as amended June 29, 1906.

2. That pursuant to the provisions of said section 16, the Attorney General of the United States, in accordance with the provisions of the Expediting Act, approved February 11, 1903, filed in said causes a certificate that in his opinion the causes are of general public importance.

3. That thereupon said causes were assigned for a final hearing before three of the Circuit Judges of said Northern District of Illinois, and final decrees enjoining the Interstate Commerce Commission were entered by said Circuit Court on June 30th, 1908.

4. That appeals from the said Circuit Court to this court were perfected by said Interstate Commerce Commission; that appellant, the Interstate Commerce Commission, has filed its brief in this court, and appellees, The Chicago & Alton Railroad Company and The Illinois Central Railroad Company, have filed their brief in this court.

5. That these causes involve the same question and will be heard together.

6. That said section 16 of said Act to Regulate Commerce in regard to causes of this character provides: "Upon appeal as therein authorized to the Supreme Court of the United States the cause shall have in such court priority in hearing and determination over all other causes except criminal causes."

Further these appellees suggest that by the regular

custom of the trade all contracts for the supply of fuel coal are made on April 1st for the next succeeding year, that they are unable to make their contracts for the purchase of their fuel supplies without a final determination of these causes and that therefore an early determination of said causes is of great importance not only to these appellees but to all rail roads, to the mines with whom they contract, and to the public.

Respectfully submitted,

Solicitor for The Chicago & Alton R. R. Co.

Solicitor for The Illinois Central R. R. Co.

I agree to an early hearing of these causes.

Attorney General of the United States.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY,
Appellee. } No. 232.

INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee. } No. 233.

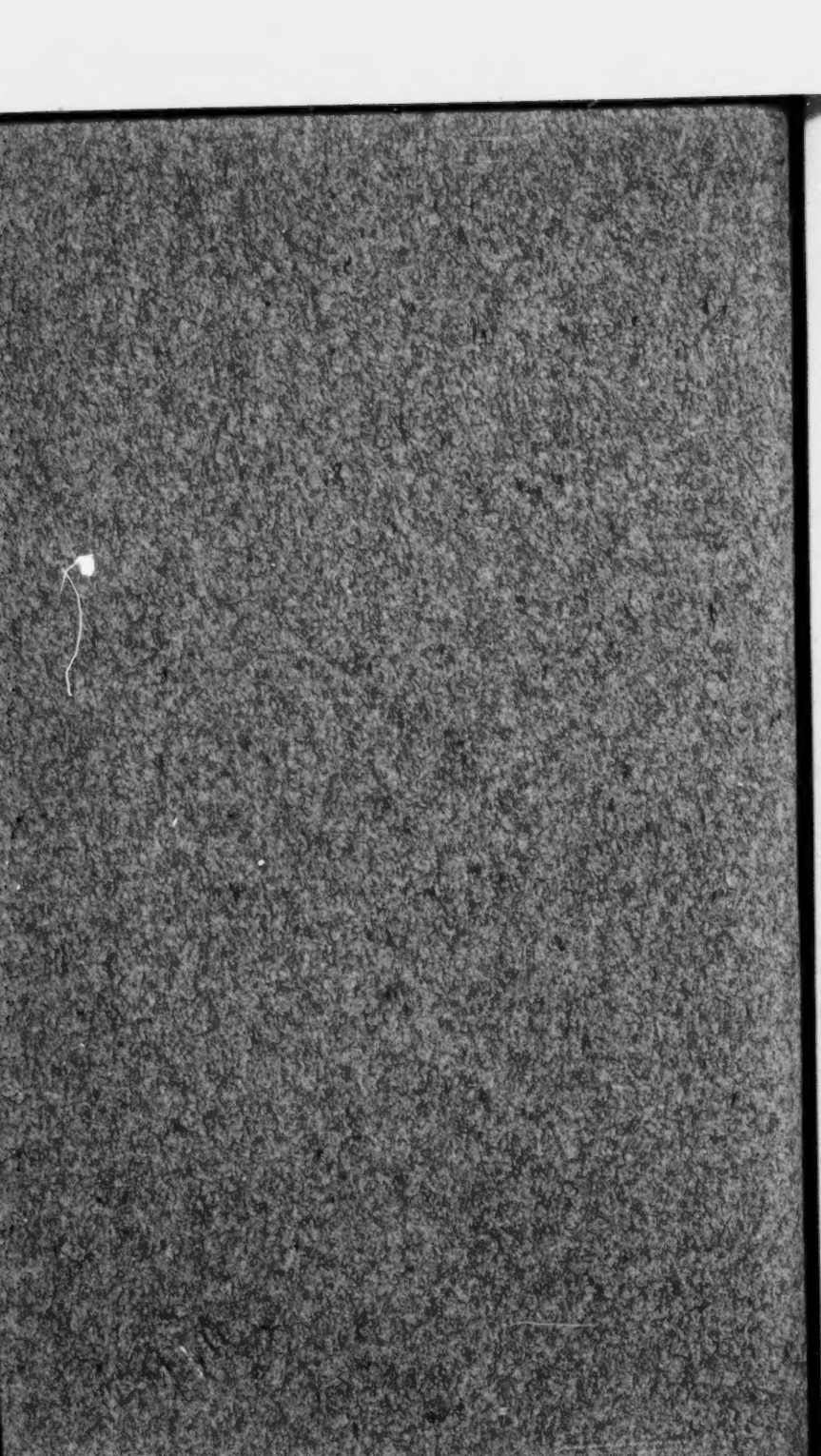
Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLANT.

L. A. SHAVER,
Solicitor for Appellant.

H. B. ARNOLD,
Special Counsel.

F. B. TOOTHAKER, Law Printer, 1240 N. Third St., Columbus, O.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

INTERSTATE COMMERCE COMMISSION, Appellant, vs. THE CHICAGO & ALTON RAILROAD COMPANY, Appellee.	No. 501.
INTERSTATE COMMERCE COMMISSION, Appellant, vs. THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellee.	No. 502.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLANT.

STATEMENT.

The questions arising in these cases being substantially identical, by agreement of parties and with consent of the court the cases will be argued and submitted together.

The appellees filed their bills of complaint in the Eastern Division of the Circuit Court for the Northern District of Illinois, alleging that they are common carriers in and between the State of Illinois and other states, praying therein that the appellant be enjoined from taking any steps or instituting any proceedings to enforce an order made by appellant in certain proceedings pending before it on complaint of Glenn W. Traer, Receiver of The Illinois Collieries Company, against appellees and The Chicago, Peoria and St. Louis Railway Company, which complaints were by agreement heard together before the Commission and disposed of in one report and order.

The complainant before the Commission claimed that in the distribution of cars the appellees distribute cars to the coal mines on their respective lines, upon tonnage ratings established by them, but that in periods of car shortage foreign railway fuel cars, private or leased cars and the railroad companies' own fuel cars are not charged against the distributive shares of the mines to which they are consigned.

The complainant claimed that the failure of the railroad companies to charge company fuel cars, foreign railway fuel cars and private cars against the distributive shares of the mines to which they were consigned, results in unjust discrimination against complainant's mines and other mines not receiving the special cars.

"Foreign railway fuel" cars are cars coming upon the lines of a railroad consigned by a foreign or connecting railroad to a particular mine to be loaded with coal for the use of the foreign or connecting railroad. "Private" cars include all cars belonging to mine owners or consignees, or leased or operated in a particular service for particular shippers. "Company fuel" cars include cars in which is loaded coal from mines on railroads for whose use the coal is loaded.

Complainant before the Commission contended that in times of car shortage the railroad companies should, in the distribution of their available equipment, charge the so-called special or arbitrary cars against the distributive shares of the mines at which they are loaded, claiming that the failure to charge these cars results in the mines receiving them having many unreasonable and unjust advantages, including a decreased cost of production of all the coal produced at such mines.

A full hearing was had upon the complaint, and the Commission found that the failure to charge the special or arbitrary cars results in undue and unjust discrimination against the mines which do not receive such cars, and ordered that the railroad companies on or before July 1, 1908, and during a period of at least two years thereafter, should maintain and enforce a practice or regulation, taking into consideration the special or arbitrary cars as affecting interstate shipments of coal, and that

> "If the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign rail-

way fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars, except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

The appellees in their bills of complaint in the cases at bar claim that the order of the Commission is unreasonable and oppressive, in that it deprives foreign railways, mine owners and appellees of their lawful right to contract for the sale and delivery of coal, and that the failure to charge the special or arbitrary cars does not result in undue or unreasonable discrimination. Other reasons, argumentive in character, are given by appellees in support of their prayer for an injunction against the enforcement of the order of the Commission.

The Commission answered admitting many of the averments of the bills, and denying the averments that its order is oppressive and unreasonable.

The answers aver that the allotment of the special or arbitrary cars to the mines receiving them, in addition to the full distributive shares of such mines in the general distribution, and the failure by the appellees to count and charge these cars against the mines receiving them in the general distribution, results in undue and unreasonable preference to the mines receiving the special or arbitrary cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(a.) That the operator receiving the special or arbitrary cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

(b.) That the operator receiving the special or arbitrary cars operates his mine to a fuller capacity, and thereby reduces the cost of production, resulting in an increased profit on the commercial coal produced.

(c.) That the operator receiving the special or arbitrary cars is enabled to increase the number of working places in the mine and develop the mine more rapidly, is enabled to increase his capacity rating, and that in future re-ratings the mine receives a higher rating, and consequently a larger number of cars in the general distribution by appellees.

(d.) That the operator receiving the special or arbitrary cars is enabled thereby to secure a larger, more efficient and regular working force of miners and laborers.

(e.) That the development of the mines which do not receive the special or arbitrary cars is retarded in inverse ratio as the development of the mines receiving such cars is accellerated.

(f.) That by the arbitrary allotment of foreign railway and company fuel cars the appellees are enabled to secure low prices on railway fuel, because the operator receiving such cars is enabled to produce his commercial coal at a cost less than at the mines which do not receive the arbitrary or special cars.

(g.) That the operator of the mine receiving the special or arbitrary cars is thereby enabled to make contracts for the delivery of coal distributed over long periods, to an extent that the operator who does not receive such cars cannot.

The answers aver that the advantage to the operators of the mines receiving the special or arbitrary cars enables such operators to produce all coal produced by them, including coal for commercial shipments, at a cost of from 5 to 20 cents per ton less than by the operator who does not receive such cars, and that by reason thereof the appellees and such foreign

railroads have been enabled to and do purchase their supplies of coal at prices of from 5 to 20 cents per ton less than the prevailing market prices on commercial coal.

The answers aver that by reason of the arbitrary allotment of such cars the mines receiving them are thereby enabled to produce their commercial coal at from 5 to 20 cents per ton less than the cost of production at the mines which do not receive such cars, and to this extent the operators of mines receiving the special or arbitrary cars have an undue and unreasonable advantage over the operators of mines which do not receive such cars, in the marketing of their commercial coal.

The answers aver that appellees and the foreign railroads urge and insist upon the arbitrary allotment of the arbitrary and special cars in order that they may purchase their respective supplies of railway fuel at prices lower than the market prices on commercial coal.

We believe the foregoing are the material averments of the bills and answers.

The cases were submitted for final decree on bill and answer before three circuit judges under the Act approved February 11, 1903.

In the proceedings before the Commission, as set forth in the answers (No. 501 R., p. 18), and in the arguments in the Circuit Court, counsel for appellees stated their views to be that the foreign railway fuel cars and the private cars should be charged in the general distribution of cars by appellees, and that in these respects the order of the Commission was proper and lawful, but contended that the part of the order of the Commission requiring appellees to count the company fuel cars was unreasonable and unlawful.

The court found that appellees were entitled to the relief prayed for in their bills in so far as the order of the Com-

mission related to the counting and charging of company fuel cars, but found that the appellees were not entitled to the other relief prayed for, and the same was denied. The Commission was enjoined from enforcing and from taking any steps or proceedings toward enforcing that part of its order requiring the appellees to count their own fuel cars in the general distribution of cars. The court did not dismiss the bills of complaint.

The appellant now appeals to reverse the findings and decrees of the Circuit Court.

SPECIFICATION OF ERRORS.

The findings and decrees of the Circuit Court are erroneous in the following particulars, to wit:

I.

The Circuit Court erred in not dismissing the bills of complaint for want of equity, for the following reasons, viz.:

a. The Allotment of foreign railway fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by appellees and the failure to count and charge foreign railway fuel cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 20);

b. The allotment of private cars to the mines receiving them, in addition to the full distributive shares of such mines in the general distribution of cars by appellees, and the failure to count and charge private cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 21);

c. The allotment of appellees' fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by appellees and the failure to count and charge appellees' cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 21);

d. There is not set forth insaid bills of complaint or made part thereof as an exhibit, the report and opinion of the Commission, stating the grounds upon which it based the order in question;

e. On the allegations in the bills of complaints and the denials and allegations of the answers, and particularly on the allegations marked "a", "b", "c", "d", "e" "f", and "g" in paragraph XIV, the finding and decree of the Circuit Court should have been in favor of appellant and the bills should have been dismissed;

f. The Circuit Court should have held that the Commission has exclusive original jurisdiction over the subject matter of this action, and that until the Commission had determined the reasonableness of the railway practices involved the Circuit Court should not have entertained jurisdiction in the case of The Majestic Coal & Coke Co. vs. The Illinois Central Railroad Company (No. 502 R. p. 9).

II

The Circuit Court erred in holding that each of the complainants respectively were "entitled to an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands it to count its own cars that are being employed in hauling its own fuel as available commercial equipment."

III

The Circuit Court erred in granting an injunction against the enforcement of that part of the Commission's order which commanded each of the complainants respectively "to count its own cars that are being employed by it in hauling its own fuel as available commercial equipment."

IV

It is presumed that the order of the Commission was properly made, and as upon the admissions in bills and answers the discrimination complained of is admitted, the burden was upon appellees to show that this discrimination was justified.

ARGUMENT.

I.

a. The Allotment of foreign railway fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by appellees and the failure to count and charge foreign railway fuel cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 20);

b. The allotment of private cars to the mines receiving them, in addition to the full distributive shares of such mines in the general distribution of cars by appellees, and the failure to count and charge private cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 21);

These points will be discussed together, and although not arising on the appeals are necessary to a complete understanding of the controversy.

In compliance with the resolution of Congress, approved March 7, 1906, entitled "Joint resolution instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies in coal and oil, and report on the same from time to time," the Commission spent several months investigating the relations between interstate carriers and coal shippers on the lines of such carriers and as to the use of private and special cars on the

lines of such carriers. The testimony taken in this investigation comprises nearly seven thousand pages. On January 25, 1907, the Commission made a partial report to Congress of its proceedings and recommendations. On page 68 of the report is found the following:

> "Fuel supply coal for railroads. * * * The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation and give him an advantage over a competitor who has no order for fuel coal.
>
> "This system of alloting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

On page 80 of the report is the following:

> "In the opinion of the Commission the use of 'individual cars' is a source of discrimination, inequality, and unfairness in the service rendered to the shippers by the carriers, and steps should be taken at the earliest possible moment to abolish their use in the coal service."
>
> "Another source of discrimination in the system of car distribution on the several railroads is the assignment of cars to certain operators for fuel coal or company coal without charging such cars against the pro rata distributive shares in the equipment of the road. In other words, treating such assigned cars as arbitrary cars and also treating cars from other roads for fuel coal as arbitrary cars, and not counting them against the percentage to which the operator receiving them is entitled. This method of distributing cars interferes with, and to

> a certain extent nullifies any fair system of distribution which may be put into effect, creates inequalities and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel coal and the market price thereof."

The findings and recommendations of the Commission in the above report were the results of thorough investigation, and the conclusions reached as to the discriminations resulting from the arbitrary assignment of private cars and railway fuel cars are based upon the conditions and relations found, not between one shipper and one railroad, but between many railroads and many shippers.

It is interesting to note the testimony of the officials of the larger railroad systems as to the advisability of permitting the use of private cars on their lines. On pages 77, 78 and 79 of the Commission's report it is found that the following officials deplored the fact that they were transporting private cars and hoped that their use might be abolished; W. W. Atterbury, general manager of the Pennsylvania Railroad; John P. Green, first vice president of the Pennsylvania Railroad; James McCrea, now president of the Pennsylvania Railroad; John B. Thayer, fourth vice president of the Pennsylvania Railroad; Michael Trump, general superintendent of transportation, Pennsylvania Railroad; Hugh L. Bond, Jr., vice president the B. & O. Railroad; Arthur Hale, superintendent of transportation, B. & O. Railroad; H. S. Ewings, superintendent of freight transportation of the New York Central & Hudson River Railroad; Alfred H. Smith, general manager of the New York Central and Hudson River Railroad. On page 79 is found the testimony of several coal operators who also condemned the use of private cars.

Section 1 of the act, as amended June 29, 1906, provides that it shall be the duty of the carrier to furnish "such transportation," which is defined to "include cars and other vehicles * * *, irrespective of ownership or of any contract, express or implied, for the use thereof" * * *. It is apparent that by the amendment Congress intended to prohibit any preference through a special use or private ownership of cars.

As the result of the previous investigation which it had made the Commission was prepared to apply the evidence submitted in the cases of the Railroad Commission of Ohio v. The Hocking Valley Railway Company and The Wheeling & Lake Erie Railroad Company (decided by the Commission July 11, 1907), 12 I. C. R., 468, with a knowledge of general conditions affecting many carriers and many shippers.

In these cases the Commission found and held as follows:

> "Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so-called "private" cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or 'private' cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars alloted to such mines in the proportionate distribution. Complainant alleges unjust discrimination against other coal opera-

tors along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or 'private' cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

"Held, that a carrier should give to owner or lessee of private cars the use of such cars, and should also give to a coal company the foreign railway fuel cars consigned to it; but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars."

A few weeks prior to the submission of these cases to the Commission, Judge Morris of the U. S. Circuit Court for the District of Maryland, in the case of U. S. ex rel. Pitcairn Coal Company v. The B. & O. Railroad Company, 154 Fed., 108, had before him the determination of the proper method of allotting private cars and railway fuel cars.

Judge Morris held that private cars should be charged against the operators receiving them in the general distribution of cars by the Baltimore & Ohio Railroad. He said:

> "These regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employes of the railroad company, and must lessen the facilities in that respect, of the independent operators."

> Further remarking that otherwise "It would be ratifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region."

The Circuit Court of Appeals has reversed Judge Morris in this case, holding that foreign railway fuel cars and company fuel cars must be charged.

On January 1, 1906, the Pennsylvania Railroad Company put in force a rule by which all private cars, foreign railway fuel cars and company fuel cars were charged against the percentages of the mines receiving them. The Logan Coal Company, claiming the right to have special cars arbitrarily assigned to it in addition to its percentage under the general distribution, brought an action against the Pennsylvania Railroad Company in the United States Circuit Court, Eastern District of Pennsylvania, to compel the railroad company to arbitrarily assign these special cars to the complainant in addition to its percentage in the general distribution. In passing upon this case Judge Holland, (154 Fed., 497), holding that private cars, foreign fuel cars and company fuel cars should be charged against the percentages of the operators receiving them, said:

> "It (the railroad company) must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice which has been followed is found to work unjustly and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the Commerce Act it is the duty of a common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated. Does this order of January 1, 1906, work a discrimination against the relator? We think not."

In closing, Judge Holland said:

> "This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: U. S. ex rel Coffman v. The Norfolk & Western Railway Company, 109 Fed., 831; United States ex rel. Kingwood Coal Company vs. West Virginia & Northern Railroad Company et al., 125 Fed., 252; West Virginia & Northern Railroad Company et al. vs. U. S. ex rel. Kingwood Coal Company, 134 Fed., 198; United States ex rel. Green Brier Coal & Coke Company vs. Norfolk & Western Railway Company, 143 Fed., 266; State ex rel. vs. The C., N. O. & T. P. Railway Company, 47 Ohio State, 130; United States ex rel. Pitcairn Coal Company vs. B. & O. Railroad Company et al., —— Fed., ——.
>
> "For the reasons stated the petition for a mandamus is dismissed."

The following cases are illustrative of the general duties of carriers to not so use their tracks and facilities that one shipper shall be at a disadvantage with another.

In the case of United States v. Railway Company, 109 Fed., 831, Judge Jackson said:

> "In other words, the supply of coal cars was short, and the railway company simply pro-rated the supply on hand, without discrimination, among all the operators, the Indian Ridge included, which, under all the authorities, it not only had the right to do, but was compelled to do. Iowa Railroad Commissioners, 1878, p. 20; Riddle v. Railroad Company, 1 Interstate Commerce Rep., 594. And the railway's duty was not affected in the least by proof that the president of the

Indian Ridge Coal and Coke Company offered to furnish the railway company cars to be used exclusively in the transportation of coal from the Indian Ridge mines: First, because these cars were to be purchased of the Indian Ridge by the railway upon the installment plan, the railway thereby becoming interested therein at once, and finally the absolute owner thereof; so that, in the event of an exclusive application of the same to the business of the Indian Ridge mines there never would have been a time, from first to last, during which the railway company, by such a course, would not have been devoting rolling stock which it owned or was interested in as a common carrier to the demands of one shipper, to the exclusion of another similarly situated, which it cannot rightfully do. And, secondly, because even if it never should become interested in, or the owner of, the cars, still it may not rent its tracks to or permit them to be appropriated by others, to the detriment of other shippers, whom it should serve to the uttermost. Even with such special cars in its service, when the stress of unusual business comes, the special cars would have to be applied to the accommodation of all shippers alike. The substance of the whole thing has heretofore been well expressed by Judge Cooley in the following language:

"'It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Company v. Pratt, 22 Wall., 123, 133, 22 L. E., 827), and then to offer their use to everybody impartially. If the varieties of traffic are such and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot with any justice be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in competitive traffic.' Rice v. Railroad Company, 1 Interst. Com. R., 503."

The judgment in this case was reversed by the Circuit Court of Appeals because relator had discontinued its action before the entry of judgment in the Circuit Court, but without in any way detracting from the principles announced by Judge Jackson.

In the case of State ex rel. v. Railway Company, 47 O. S., 130, involving the duty of the railway company to equalize conditions between shippers of oil because a certain shipper used private tank cars, Judge Bradbury said:

> "No doubt a shipper who owns cars may be paid a reasonable compensation for the use, so that the compensation is not made a cover for discriminating rates or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers indifferently and upon equal terms to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country, for a very large portion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons indifferently and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a

mode of discrimination, fatal to all successful competition by small establishments and operators with large and more opulent ones, could be successfully adopted and practiced at the will of the railroad company and the favored shipper.

"The advantages, if any, to the carrier, presented by the tank car method of transporting oil over that by barrels in box cars in car load lots are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty it could not in justice avail itself of its own neglect as a ground of discrimination. It must either provide tank cars for all of its customers alike or give such rates on freight in barrel packages, by the car load, as will place its customers using that method on an equal footing with its customers adopting the other method."

In the case of United States v. Railway Company, 125 Fed., 252, Judge Goff lays down the rules under which the capacity of coal mines shall be determined as the basis for the distribution of cars. In that case it appeared that the West Virginia Northern Railroad Company owned no cars of its own, but such cars were furnished by the Baltimore and Ohio Railroad Company, over the tracks of which railroad the coal coming from the West Virginia Northern Railroad Company reached the markets.

Judge Goff treated these cars, although belonging to a foreign railroad, as the equipment of the West Virginia Northern, to be equitably allotted between the several mines on its lines according to the respective capacities of such mines.

In the syllabus it is said:

"Under the provisions of Section 3 of the Interstate Commerce Law it is the legal duty of a railroad company, in furnishing cars to coal mines along its line,

where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination or favoritism, and such distribution should be based on a disinterested and intelligent examination by experts of the different mines and upon a consideration of all the factors which go to make up their capacity, both actual and potential, the most important being the number of workings and their capacity for production, the equipment in use for handling and loading the product being secondary because it may be readily and quickly increased if necessary to meet the requirements."

The same case was before the Circuit Court of Appeals in the case of Railroad v. United States, 134 Fed., 198, wherein the decision by Judge Goff is affirmed through Chief Justice Fuller.

In the case of Stock Yards Company v. Railway Company, 99 Fed., 472, Judge Baker said:

"The remaining question is whether, under the facts and the law, it is shown that the unlawful discrimination complained of is threatened or exists. It is clear, by the force of the express terms of the Interstate Commerce Act, that in respect to interstate commerce there can be no lawful discrimination to the advantage or disadvantage of any person, place, locality or kind of traffic. A common carrier of interstate freight cannot lawfully deny switch connections and service to one person, place, locality or kind of traffic which it affords to others similarly situated. The complainant is the owner of switch connections with the Belt Railroad, which have been in existence for a long period of time. Such switch connections were made with the consent of the Belt Railroad and under the authority of the fourth section of the ordinance and statute above mentioned. The contention of counsel for the defendants is that these switch connections were made simply for the purpose of delivering and receiving dead freight thereat and therefrom. The existence of switch connections rightfully existing implies the right of the owner thereof to service thereat by the carrier consenting to such connections. It would be a vain and foolish thing to incur the labor and expense of making

such connections unless they were to be used in connection with the transportation of freight to and from the same. And, unless the right to service at such switch connections is limited, either expressly or impliedly, the owner thereof may lawfully insist that the carrier shall there deliver and receive all such freight as it customarily carries, if the switch connections are suitable and convenient for the delivery and receipt of such freight."

In Talcot v. Pine Grove Twp., 1 Flippin (U. S. Circuit Court), 120, the court said:

"The road once constructed is, instanter, and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular its cars, engines, rights of way, property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office."

In Rice, Robinson & Witherop v. Railroad Company, 4 Interstate Com. Rep., 131, it was held:

"It is a carrier's duty to equip its road with instrumentalities of carriage suitable for the traffic it undertakes to carry and to furnish them alike to all who have occasion for their use, and its duty to furnish equipment cannot be transferred to nor required of shippers. When a carrier accepts and uses cars for transportation owned by shippers or others, in legal contemplation it adopts them as its own for purposes of rates and carriage, and neither the manner of acquiring cars nor inability to furnish its general patrons the use of cars similar to those furnished by some shippers for their own traffic can excuse or justify a carrier for discrimination in rates that may give one shipper advantage over another; nor can any device, such as payment of unreasonable rent for use of cars furnished by shippers, be practiced to evade the duty of equal charges for equal service."

In the opinion, p. 149, it is said:

"It is not the business of a shipper to furnish his own tanks. That is the duty of the carrier. Under its fran-

chises the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in the rates. For all transportation purposes, so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties, whether he owns or hires his vehicle. When, therefore, he accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can only supply box cars in which barrels must be used for the oil, he is bound to see that he gives no preference in rates to the tank shipper and that he subjects the barrel shipper to no disadvantage. It is at this point that the duty of the carrier to the public is rigorous, and where no plea of inability to furnish tanks, or other excuse, is admissible.

* * * The duty to furnish impartial transportation cannot be evaded on any pretext. It is fundamental and imperative."

In Rice v. Railroad, 1 Interstate Com. Rep., 503, it is said at page 547:

"The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Company v. Pratt, 22 Wall., 123, 133), and then to offer their use to everybody impartially. If the varieties of traffic are such and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance can not with any justice be utilized by the carrier in such manner as to establish discriminations which would

otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of patrons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic. * * * The tank cars which are furnished to the carrier by shippers, whether the use is paid for or not, ought properly to be held for the use of all."

In Independent Refiners' Ass'n v. Railroad Company, 5 Interstate Commerce Commission Rep., 415, it was held:

"It is the duty of the carrier to equip its road with the means of transportation, and, in the absence of exceptional conditions, those means must be open impartially to all shippers of like traffic."

In the opinion, at page 434, it is said:

"If the carrier should rent from a car-furnishing company, who are not shippers, cars better adapted to a particular traffic than its own, and should limit their use to one class of its customers and at a cheaper rate than is charged to its other customers for the use of its own cars, no one could question the injustice of such discrimination. In principle, the case is the same, whether the shipper or some outside party is the source of supply."

In Railroad Company v. Railroad Company, 110 U. S., 667, it was held:

"Section 6 of Article 15 of the Constitution of Colorado, giving equal rights to all in the transportation of persons and property of the railroads in the state, imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity without undue or unreasonable discrimination, either in charges or facilities."

In St. Paul, Minneapolis and Manitoba Railway Company v. Wenzel, 139 U. S., 128, the court said:

"A railroad company, as a common carrier of live stock, is obliged to provide necessary means and facil-

ities for receiving live stock offered it for shipment and for its delivery to the consignee, and cannot, without special contract, require compensation from the shipper or consignee for providing such means and facilities in addition to the customary and legal charges for transportation.

"The duty of a carrier of live stock to receive, transport and deliver it will not be fully discharged unless the carrier makes provision at the place of loading to properly receive and load the stock and provision at the place of unloading to properly deliver the stock to the consignee.

"A carrier of live stock cannot make special charge for merely receiving or delivering it in and through stockyards provided by itself, and it cannot invest another corporation with authority to impose burdens of that kind upon shippers and consignees.

"When a railroad company does not provide suitable facilities for the delivery of live stock contracted to be carried by it, it may be compelled to deliver through facilities furnished by the consignee."

In Railway Company v. Goodridge et al., 149 U. S., 680, it was held:

"It is no proper business of a common carrier to foster particular enterprises; it is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality."

In the case of Root v. Railroad Company, 114 N. Y., 300 (11 Am. State Rep., 643), Haight, J., on page 304, said:

"In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it could carry under the same conditions for others is void as creating an illegal preference; that common carriers are public agents transacting their business under an obligation to observe equality toward every member of the community, to serve all persons alike, without giving unjust or unreasonable advantage by way of facilities for the carriage, or rates for the transportation of goods. Messenger v. Railroad Company, 36 N. J. L., 407; 13 Am.

Rep., 457; State ex rel. Atwater v. D., L. & W. Railroad Company, 48 N. J. L., 55; 57 Am. Rep., 543. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them as early as means will allow; that it cannot directly exercise unreasonable discrimination as to whom and what it will carry; that it cannot impose unreasonable or unequal terms, facilities or accommodations. McDuffee v. P. & R. Railroad Company, 52 N. H., 430; 13 Am. Rep., 72; to similar effect are cases in other states; New England Express Company v. M. C. R. R. Company, 57 Me., 188; Shipper v. P. R. R. Company, 47 Pa. St., 338; Fitchburg R. R. Company v. Gage, 12 Gray, 393; Menacho v. Ward, 27 Fed. Rep., 529."

The case of Brundred et al. v. Rice, 49 O. S., 640, involved the right of a railway company to discriminate in favor of a shipper who established and maintained a system of pipe lines to its road.

In the opinion, at pages 649 and 650, it is said:

"That the contract between Brundred and his associates was against public policy and void will hardly admit of a question. As said by Baxter, J., in Handy v. Railroad Company, 31 Fed. Rep., 689, 'Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation or individuals owning them, and to that extent private property, they are by law and consent of the owner dedicated to the public use. * * * Except in the mode of using them, every citizen has the same right to demand the services of railroads, upon equal terms, that they have to the use of a public highway or the government mails.' Whatever may have been the financial condition of the railroad company, it was not warranted in making a contract by which it bound itself to carry for one shipper at half the rate it agreed to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road; at the same time and for the same consideration binding itself to charge all others double the amount as a fixed open rate and to

pay to such favored shipper one-half of it when collected."

In Railroad Company v. Interstate Commerce Commission, 200 U. S., 361, the court said:

> "Deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates and its prohibitions against undue preferences and discriminations whenever from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made."

In the case of Johnson Coal Mining Company v. The Hocking Valley Railway Company, 14 Ohio Dec., 209, Judge Dillon, of the Franklin county, Ohio, Common Pleas Court, in ordering the defendant to permit a connection between its main line and a mine side track, said:

> "A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight, it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

This opinion was followed in a later case by the Circuit Court of Franklin county, Ohio.

In Elevator Company v. Railroad Company, 10 Interstate Commerce Commission Rep., 629, it was said:

> "Every shipper is legally entitled to fair opportunity and treatment in the use of these public utilities, and any discrimination which in substantial degree deprives shippers of such use must be considered unjust, unless forced by justifying conditions. In such a case the burden of proof is upon the complainant to the extent of showing discrimination, and then upon the carrier to show that the discrimination was justified."

By the provisions of Section 3 of the act it is declared to be unlawful for any interstate carrier to make any undue or unreasonable preference or advantage as to any person or locality.

In the cases at bar appellees contend for the right to so distribute cars, as that certain of their shippers by the facilities furnished shall be enabled to greatly reduce the cost of producing their coal. The discrimination prohibited by Section 3 is not merely as between shippers engaged in interstate commerce, but it prohibits an interstate carrier from discriminating, "in any respect whatsoever," between shippers, whether one be intrastate exclusively and the other interstate exclusively, or either or both be engaged in intrastate and interstate business concurrently.

The advantages which the favored mines receive are not from the mere fact that they receive these arbitrary cars, but from the manner in which the appellees use their tracks and motive power in the transportation of these cars and in the manner in which they distribute their system cars.

These advantages exist not because of any act of the operator with the special cars, but because the railroad companies furnishing facilities permit him to increase his output and thereby reduce his cost of production. The advantages to the operators are not from anything that they do, but from the act of the railroad companies in giving

them more cars than they are entitled to receive under a fair system of distribution.

If this practice should be established coal operators having large capital would own their own cars and thereby have a great advantage over smaller operators without capital to buy cars. If such a right was recognized, it would place coal operators with small capital at a great disadvantage in competition with operators having large capital, and this would be such an advantage as that the larger operators could drive the smaller operators out of business.

The cases at bar were submitted to the Circuit Court upon bill and answer and the appellees thereby admit the advantages to the operators receiving the foreign railway fuel cars and private cars without their being charged in the general distribution, and the consequent disadvantages to the mines which do not receive such cars, as specifically set forth in the answers.

A copy of the opinion of the Circuit Judges in the cases at bar by Baker, C. J., is found in No. 501 R., p. 52, 53 & 54. As to the foreign railway fuel cars and private cars, Judge Baker said:

> "I. The so-called private cars.
>
> "A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If

his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is *pro tanto* void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

"It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business.

"Where federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

"II. Fuel cars of foreign railroads.

"The fact that these railroads are themselves common carriers has nothing to do with the case. Here they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment."

In B. & O. Railroad Co. vs. U. S. ex rel. Pitcairn Coal Co., (decided Sept., 1908), the Circuit Court of Appeals at Richmond, and in B. & O. Raiload Co. vs. Interstate Commerce Commission, (decided Sept., 1908), Judges Goff, Pritchard and Morris at Baltimore, have held that private and foreign railway fuel cars ***must be charged.***

In the Circuit Court for the Southern District of Ohio, Judge Thompson, in granting a motion for a new trial in the case of the Riverdale Mining Co. vs. The Baltimore & Ohio Railroad Co., citing the Logan Coal Co. and Pitcairn Coal Co. cases, said:

> "When the supply of cars is insufficient to meet the demand, the distribution should be based upon the cars *available*, whether owned by the railroad companies, mine owners, or other railroad companies, and made pro rata according to the rated capacity of the mines."

(This decision was rendered in December, 1907, is unreported and reverses Judge Thompson's ruling referred to by Judge Morris in 154 Fed., 108, and by the Circuit Court of Appeals in the Pitcairn Coal Co. case.)

Direct rebates in freight rates are practically, if not entirely, a thing of the past. The pressure of shippers, particularly those controlling large tonnages, on the traffic departments of the railroad companies, and the desire of the traffic departments to control the shipments of large producers, naturally inclines railroad managements toward favoring large shippers. As an advantage cannot be given by direct rebate, the disposition is to confer such advantages through railway practices, working discriminations in favor of the shippers desired to be favored. The failure to count foreign railway fuel cars and private cars is one form of discrimination, which has naturally arisen, and which it is difficult for the railroad companies, under pressure from large shippers, to abolish. The direct financial advantage to the shippers is often greater through a discriminatory practice than would be afforded through a rebate, but the Interstate Commerce Act forbids an advantage through a practice as much as it does through a rebate.

No cross appeal has been taken as to the foreign railway fuel cars and private cars, but in order to have a full under-

standing of the entire subject matter and the relation of company fuel cars thereto we have deemed it advisable to fully argue the foreign and private car questions.

c. The allotment of appellees' fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by appellees and the failure to count and charge appellees' cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage, in the particulars set forth in paragraph XIV of the answers (No. 501 R. p. 21);

The failure to charge or consider company fuel cars in the general distribution of cars by appellees admittedly results in the advantages to the operators receiving these cars in the particulars set forth in the answers.

To illustrate this advantage if a mine has a capacity of 1000 tons per day and is supplying 250 tons of company fuel, with a 50 per cent. car supply this mine would ship 500 tons of commercial coal and 250 tons of company fuel A mine of equal capacity without the company fuel cars would ship 500 tons.

The Circuit Court through Judge Baker, after saying in emphatic terms that the private cars and foreign railway fuel cars must be charged, recognizes that the advantages to the mines receiving the company fuel cars must receive consideration saying, "and this does not mean that these cars do not effect the problem of an equitable distribution of commercial equipment." Recognizing that there are advantages through the failure to charge the company fuel cars, and recognizing the principle that the advantage to the mines receiving the cars should receive consideration, Judge Baker suggests as the remedy that the company fuel shipped from a mine should be deducted from its capacity rating and

that the distribution be then made upon the reduced capacity, which as he says is available for commercial shipments. The court recognizes the principle contended for, viz., that the appellees should not be permitted to afford an advantage in their distribution of cars, but applies a different remedy from that found in the order of the Commission.

What is the result of the remedy suggested by the Circuit Court?

Applying this remedy to the illustration used we find that the mine of 1000 tons capacity which ships 250 tons of company fuel, with a 50 per cent. car supply would then have a net rating of 750 tons, and would ship 375 tons of commercial coal, in addition to the 250 tons of company fuel, or 625 tons altogether. The mine of equal capacity not shipping company fuel would only ship 500 tons. The mine receiving the company fuel cars would ship 125 tons or 25 per cent. more than the mine without these cars.

This increased production would result in the favored mine having all of the advantages set forth in the answers. The only difference in the suggestion of the Circuit Court and the method ordered by the Commission (both recognizing the principle that no advantage should result to the mine receiving the company fuel cars), is that under the suggestion of the Circuit Court the advantage to the mine receiving the company fuel cars will be less than if the cars be not charged.

Under the method provided in the order of the Commission, with the company fuel cars charged against the distributive shares of the mines receiving them, the mines would each ship 500 tons of coal per day on a 50 per cent. car supply, and there would be no advantage to the mines receiving the company fuel cars.

When a discrimination is recognized the remedy applied should entirely do away with the evil and should place the mines on an equality.

It may be conceded in the cases at bar that the company has the right to segregate that portion of its equipment necessary for the transportation of its own coal and that these cars are not available for commercial shipments. The order of the Commission in no way detracts from this principle. The order of the Commission and the judgment of the Circuit Court recognize that there is an advantage from the failure to charge or consider the company fuel cars, and establish the principle that the mine receiving these cars should not have an advantage therefrom. While fully recognizing the company's right to use its cars for the transportation of its own coal and that these cars are not available for commercial shipments, yet as it is admitted discrimination now results the relief granted should entirely do away with the advantage and place the mines upon an absolute equality.

The railroad companies contend for at least a modified method of charging or considering these cars, because as admitted in this case there are advantages to the mine receiving them through reduced cost of production and otherwise. The mine receiving these cars without their being charged is enabled to produce all of its coal, including commercial shipments, at from 5 to 20 cents per ton less than the mine which does not receive the cars. (No. 501 R., pp. 20, 21 and 22.)

The motive of appellees is apparent. They desire to purchase their supplies of coal at the lowest possible prices, and if by not charging the company fuel cars against the distributive shares of the mines receiving them or by deducting the company fuel shipments from the ratings, the mines are enabled to produce their coal from 5 to 20 cents per ton less than the mines which do not receive these cars, the railroad company is enabled to purchase its coal at from 5 to 20 cents per ton less than the prices in the commercial markets.

We submit that because a railroad company is enabled to purchase its supplies of coal at lower prices, it is not justified in so distributing cars as that one mine shall have an advantage over another. The Circuit Court recognizes that there is an advantage from the failure to charge the cars and applies a remedy intended to take away this advantage. Why then should not a remedy be applied which, without in any way detracting from the right of the railroad company to the exclusive use of cars for the transportation of its own coal, will entirely do away with this advantage?

If the principle be established that a company shall not in this connection afford an advantage to one mine over another, then, recognizing the right of the railroad to the exclusive use of cars for the transportation of its own coal, it follows logically that the company fuel cars should be charged against the distributive shares of the mines receiving them rather than that the shipments of company fuel be deducted from the mine's rating. If the railroad company is bound not to discriminate through the consigning of cars for its own coal, and may be compelled to establish a practice which will prevent such discrimination, then this practice should fully, not partially, remedy the evil. If a complete remedy is found in rules of car distribution and only a partial remedy is found in rules of mine rating, and the appellees should be required to apply *some* remedy, should not the complete remedy be applied?

The railroad company should be permitted to buy its coal at as low prices as possible, but it has no right to obtain lower prices through discriminatory practices.

In U. S. ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio R. R. Co., 154 Fed. 108, at page 117, Judge Morris said with reference to *foreign railway fuel* cars, "These cars are never available for commercial shipments," and again at page 118,

"Similar considerations apply, also, to the purchases of coal at the mines by the Baltimore & Ohio Railroad Co. itself."

The Circuit Court in the cases at bar says with reference to *company fuel* cars, "These cars are withdrawn from complainants' available commercial equipment." Thus the Circuit Court, while differing with Judge Morris as to the proper method of allotting foreign railway fuel cars, assigns as a reason for not charging company fuel cars the reason assigned by Judge Morris for not charging foreign fuel cars.

Under the order of the Commission foreign railway fuel cars and company fuel cars are to be delivered to the mines to which they are consigned, and the right of the mines receiving them to load these particular cars is recognized, but all discriminatory results are removed by the requirement that they be charged against distributive shares.

In Logan Coal Co. vs. Penn. Railroad Co., 154 Fed., 497, at page 503, after holding that private cars should be charged, Judge Holland said:

> "What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company, or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata, to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: U. S. ex

rel. Coffman v. Norfolk & Western Railway Co. (C. C.) 109 Fed., 831; United States ex rel. Kingwood Coal Co. v. West Virginia & Northern Railroad Co. et al. (C. C.), 125 Fed. 252; West Virginia & Northern Railroad Co. et al. v. United States ex rel. Kingwood Coal Co., 134 Fed. 198, 67 C. C. A., 220; United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & Western Railway Co., 143 Fed., 266, 74 C. C. A., 404; State ex rel. v. C., N. O. & T. P. Ry. Co., 47 Ohio St., 130, 23 N. E., 928; United States ex rel. Pitcairn Coal Co. v. B. & O. R. Co. et al., 154 Fed., 108."

In B. & O. Railroad Co. et al. vs. U. S. ex rel. Pitcairn Coal Co., supra, the Circuit Court of Appeals, citing Railroad Commission of Ohio vs. Hocking Valley Railway Co., 12 I. C. C. R., 466, and Logan Coal Co. vs. Pennsylvania Railroad Company, 154 Fed., 497, said.

> "It is manifest that it was the purpose of Congress to prevent railroad companies from resorting to such means in order to evade the requirements of the act, to wit, a fair and equal distribution of facilities among shippers similarly situated. In determining as to whether there has been an undue and unreasonable preference in any particular instance, the sole question to be considered is as to whether all the cars hauled over the carrier's lines have been pro rated so as to give each and every shipper on its lines his proportionate share of facilities to which he is entitled on the basis agreed upon as the means by which there should be a fair and equal distribution of such car service. Therefore, when we consider the statute, the provisions of which are plain and unmistakable, we are impelled to the conclusion that the arbitrary allotment of the fuel cars of the company and foreign fuel cars is violative of the provisions of the act."

This decision reverses the holding of Judge Morris as to company fuel cars found in U. S. ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio Railroad Co., 154 Fed., 108.

The principle that company fuel shipments shall be charged or considered is determined in Baltimore & Ohio Railroad Co.

vs. U. S. ex rel. Pitcairn Coal Co., in Logan Coal Co. vs. Pennsylvania Railroad Co. and in the cases at bar, and in no decision, except that by Judge Morris reversed as above stated, has the right of a railroad been recognized to allot company fuel cars in addition to full percentages in the general distribution.

The principle that railroads shall not discriminate by allotting company fuel cars in addition to full percentages in the general distribution, thus recognized by all of the decisions on the subject, is in accordance with the broad intent and purpose of the Interstate Commerce Act that all shippers shall be placed upon an absolute equality, and is the principle running through the decision of this court in Railway Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

In its report to Congress under the Tillman-Gillespie Resolution, referring to the distribution of company fuel cars without the same being charged, the Commission said:

> "This method of distributing cars interferes with and to a certain extent nullifies any fair system of distribution which may be put into effect, creates inequality and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel and the market price thereof."

We submit this conclusion because it was the result of prolonged hearings at which the representatives of all of the eastern trunk lines were heard, and of the most thorough investigation that has been made of this general subject matter.

It may be contended that the Interstate Commerce Act is restricted to "traffic," and that the method of considering company fuel cars is not traffic. Section 1 of the Act as amended June 29, 1906, provides that the term "transporta-

tion" shall include "all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery, elevation and transfer * * * of property transported." This definition of transportation is by express reference adopted in Section 15. The Act forbids all undue discrimination, and the Commission is authorized to determine and prescribe the reasonable practices which the carriers shall establish. Rules of car distribution determine the "facilities" and "services" rendered by the carrier to its shippers. The rules under which cars may be placed on mine sidings and at mine tipples may and do result in discriminations as great as can be given by direct rebates.

The Interstate Commerce Act as amended is much broader than the English Railway and Canal Traffic Act, and it is undoubtedly the purpose of the Interstate Commerce Act to control discrimination in railway practices as well as in the making of rates.

It may also be contended that in the purchase of coal the railroad company is acting in its private capacity, and that its acts as a private corportion are not within the terms of the Interstate Commerce Act. It is true that there is a distinction to be drawn between the business management of a railroad company and the duties which it owes as a common carrier. Where the purely business phases of the operations of a railroad company are in no way connected with or involved with its duties as a carrier no question of discrimination can exist. The railroad company should, of course, purchase its supplies of coal at the lowest prices and on terms most advantageous to it, but where it establishes rules, whether of mine rating or car distribution, which result in discriminations between its shippers, it cannot justify a discriminatory practice by the plea that it is thereby enabled to purchase its supplies of coal at lower prices. It can not, by the mainte-

nance of discriminatory practices, give to the mine which ships both railroad fuel and commercial coal an advantage in the cost of producing all its coal which may be prohibitive to the mine which does not ship railroad coal.

A railroad company has a right to buy its coal as cheaply as it can, but it must not in any facilities furnished unjustly discriminate as between shippers. Were it a private corporation, without public duties, the shipment of coal in its own cars might warrant it in obtaining all the advantages it could obtain therefrom. But if, through the combination of its acts as a private corporation and its acts as a public carrier, there is discrimination as between its shippers, and it lies within its power to remove this discrimination, it must do so to the fullest extent within its power.

In the case of United States v. Transit Company, 142 Fed., 248, it was held:

> "It is the manifest purpose of the statute regulating interstate commerce to strike through all pretense and all ingenious devices to the substance of the transaction, and it is the duty of the courts to recognize and carry into effect such purpose in suits for their enforcement."

While its acts as a private corporation are not subject to control under the Interstate Commerce Act, yet it cannot justify a violation of its duty as a common carrier by advantages it receives as a private corporation. Such an evasion of the purpose of the Act will not be tolerated.

The argument is made that a railroad has the right to the exclusive use of such portion of its equipment as may be necessary for the transportation of fuel used in its operations, and that cars so used are not available for commercial shipments. This may be conceded in the cases at bar.

It is suggested that no one but the appellees have any interest in shipments of fuel for their use, that they derive no

income from the transportation of their own fuel, and that the transportation of this fuel is not traffic.

It is claimed that as cars in which fuel for appellees' use is loaded are not available for commercial shipments, mines which do not load these cars cannot complain of the method of distribution in use by appellees. It is claimed, in justification of the discrimination admitted to result from the failure to charge the company fuel cars, that appellees are exercising a power which is not subject to regulation, i. e.: the right to purchase their fuel at as low prices as they can obtain.

These are specious arguments.

It stands admitted in the pleadings (No. 501 R., p. 21), that the appellees "are enabled to secure low prices on railway fuel, because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars."

It stands admitted in the pleadings (No. 501 R., p. 21), that the operator receiving company fuel cars in addition to his full distributive share of system cars is thereby enabled "to produce all of the coal produced by him, including coal for commercial shipments, at a cost of from 5 cents per ton to 20 cents per ton less than the cost of production to the operator who does not receive such cars."

It stands admitted in the pleadings (No. 501 R., p. 21), that appellees "have been and are enabled to purchase their supplies of coal at prices from 5 to 20 cents per ton less than the prevailing market prices on commercial coal by reason of the arbitrary allotment of such * * * company fuel cars to the mines with which complainant (appellees) * * may have contracts for their supplies of coal."

It also stands admitted in the pleadings (No. 501 R., p 22), "that by reason of the arbitrary allotment * * *of such

* * * company fuel cars the mines receiving them are thereby enabled to produce their commercial coal at from 5 to 20 cents per ton less than the cost of production at the mines which do not receive such cars, and thereby have an undue and unreasonable advantage over the operators of such mines which do not receive such cars, in the marketing of their commercial coal."

It further stands admitted in the pleadings (No. 501 R., p. 20), that the failure to charge the company fuel shipments against the mines making them results in undue and unreasonable preference or advantage to the mines receiving them and subjects the owners of mines which do not receive such cars to unreasonable prejudice and disadvantage in the following respects:

a. The operator receiving the company fuel cars receives a higher percentage of cars than do mines of equal capacity which do not receive such cars.

b. That the operator receiving the company fuel cars may operate his mine to a fuller capacity, and thereby reduce the cost of production, resulting in an increased profit on his commercial coal.

c. That the operator receiving company fuel cars is thereby enabled to increase the number of working places in the mine, is enabled to increase his capacity rating, and in further reratings would receive higher ratings and a larger number of cars in the general distribution.

d. The operator receiving the company fuel cars is enabled thereby to secure and hold a larger and more efficient working force.

e. That the development of the mines which do not receive the company fuel cars is retarded in inverse ratio as the development of mines receiving such cars is accelerated.

"When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted."

U. S. v. Trans-Missouri Freight Association, 58 Fed., 58.

See also,

Leeds v. Ins. Co., 2 Wheat, 380.
Banks v. Manchester, 128 U. S., 244.

Coal operators are frequently satisfied with a profit of from 5 to 10 cents per ton, and if certain operators are enabled through the facilities afforded these operators by the railroads serving their mines, to produce coal at from 5 to 20 cents per ton less than their competitors, the operators with this advantage have their competitors at their mercy and may drive them out of business. Appellees cannot justify a practice which results in such discrimination as between their shippers.

The appellees are common carriers, and cannot, either in the making of rates or in the furnishing of facilities, grant favors which work discriminations as between their shippers. Conceding that appellees have the right to use these cars for the transportation of their fuel supplies and that they may purchase their supplies of coal at as low prices as possible, yet they cannot in violation of their duties as common carriers secure for themselves lower prices on their fuel supplies by discriminatory practices, in violation of their public duties.

In the Pitcairn Coal Co. case the Circuit Court of Appeals said:

"A carrier can not give a shipper a preference in order that it might profit thereby * * *."

It is the act of the appellees in allotting the company fuel cars, in addition to full distributive shares in the general distributions, that works the discrimination. It is through their

acts as common carriers that they are enabled to create the conditions out of which these advantages arise, and which result in such discriminations. Appellees could not justify a method of car distribution which would permit others than themselves to purchase coal at lower prices through less cost of production permitted by the method of distribution; and, strictly bound by the duty to be absolutely impartial in the facilities afforded their shippers, what they cannot lawfully do for others they cannot do for themselves.

We understand it to be conceded by appellees that private cars and foreign railway fuel cars shall be charged. *Appellees distribute all cars to the mines on their lines,* whether system cars, private cars, foreign railway fuel cars or company fuel cars, and if it is an unlawful discrimination to allot private cars and foreign railway fuel cars without charging them against percentages, because of the discrimination resulting, then the allotment of company fuel cars without charging them, is also unlawful.

Section 3 of the Act declares that it shall be unlawful for any common carriers, subject to the provisions of the act "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 1 of the Act says, "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation,

and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported."

The Interstate Commerce Act is declaratory of the common law, and as was said in U. S. ex rel. vs. Norfolk & Western Ry. Co., 143 Fed., 268,

> "The purpose of this act is to place 'all shippers on an absolute equality."

In Baltimore & Ohio Railroad Co. et al. vs. U. S. ex rel. Pitcairn Coal Co. et al., (decided September 17, 1908), the Circuit Court of Appeals said:

> "Section 1, as amended, and Section 3, confer certain rights upon shippers, and it is clearly provided, among other things, that there shall be no discrimination against or in favor of those similarly situated by the common carrier in furnishing means of transportation.
>
> "Section 1 makes it the duty of the railroad to provide and furnish such transportation upon a reasonable request therefor, and Section 3 is intended to secure to the shipper the same treatment with reference to facilities for transportation. Section 3 provides that all shippers shall have a just equality of facilities, and Section 1 provides that all shippers shall be given a just and equal sufficiency of facilities.
>
> "This is a wise provision and was intended to prevent common carriers from either directly or indirectly giving certain shippers an undue preference in the distribution of car service. In the absence of such legislation providing the means by which summary relief could be afforded the shipper, it would be an easy matter for the common carrier, by favoritism, to build up one class of shippers and at the same time utterly destroy the business of another class similarly situated, and it was to prevent such a condition of affairs that this act and the acts amendatory and supplemental thereto were passed."

Assuming that there are two phases of appellees' corporate obligations and duties, one public and one private, they cannot justify discriminatory practices, in violation of their public duties, by the plea that they are thereby enabled, in their

private capacities, to purchase their fuel supplies at lower prices. What they cannot do for others they cannot do for themselves. If, in the discharge of their respective duties they are separate persons, they are still held to a strict and impartial discharge of their public duties not to discriminate, and the advantages which they in their private capacities might acquire would, if resulting from their own discriminatory practices, be viewed the same as though received by outside persons. It stands admitted that by reason of appellees' method of allotting company fuel cars, the operators receiving them are thereby enabled to produce their coal at from 5 to 20 cents per ton less than their competitors. It lies within the power of the appellees to prevent this discrimination, resulting directly from the facilities afforded by them as common carriers, and it is their duty to furnish all shippers such facilities as that shippers shall be placed upon an absolute equality.

The inevitable result of the operation of this practice is, and those familiar with the operation of coal mines are fully aware of it, that smaller and weaker operators are practically at the mercy of their larger and stronger competitors, and in many instances gross injustice has resulted. With an advantage in cost of production which in itself is a reasonable profit, an operator may undersell his competitor and in time may drive him from the competitive field. This is not an extravagant statement, and is one that is justified by the experience had in many coal districts.

It has been the general practice of railroad companies to allot company fuel cars in addition to distributive shares in the general distribution. It has been a common practice among railroads to fix the prices which they would pay for their own fuel supplies, such prices being considerably less than the ordinary commercial prices. The smaller operators

are seldom in position to take these contracts. Quite often the railroads themselves own, or are interested in, the larger mines. The result has been that the larger mines are willing to take the company fuel contracts at low prices if the railroads will in the facilities rendered their mines confer an advantage which enables these operators to produce all of their coal at a cost much less per ton than would be possible without these facilities. With this advantage the operator having the company fuel contract has been enabled to offer coal for sale in the general markets which costs him considerably less per ton to produce than does the coal produced by his competitors without company fuel contracts. The larger operators, as the result of the *facilities afforded by the railroad*, thus have great advantages over their smaller competitors.

It has been held by the Commission that private cars are not available for *general distribution*, but must be delivered to the mines to which they are consigned, and be charged against percentages. The operators who do not receive these cars are held to have no claim to their use. In the controversy as to the allotment of private cars, the argument was made that operators without the private cars are not deprived of any right, if these cars are delivered to the mines receiving them in addition to full distributive shares in the general distribution, because other operators have no right to their use. Yet it is the settled judicial conclusion that private cars shall be charged, although restricted to the use of the mines to which they are consigned.

Company fuel cars, like private cars, are not available for *general distribution*. The exclusive right of the mines receiving both classes of cars to load them is recognized, and other mines have no claim upon *these particular cars*. Why, therefore, should not also company fuel cars be so charged?

In neither instance are the cars available for general distribution, and as to both it is recognized that the mines may receive them free from claims of other mines. The arbitrary allotment of both classes produces the same discriminatory effects. The principle applicable to the private cars applies alike to the company fuel cars.

The Commission has said that specially consigned cars are not available for general distribution, but must be charged, and while upon the facts of the cases at bar we stand upon the rule announced by the Commission it is to be noted that the Circuit Court of Appeals in the Pitcairn case does not expressly go so far as the Commission has gone in holding that specially consigned cars are not available for general distribution.

It is the act of the carrier, in the performance of its public duty, in allotting cars in addition to distributive shares under the general distribution, that results in the discrimination. Whether the cars belong to a shipper or consignee or to the railroad company itself, it is the allotment of these cars, in connection with the distribution of full shares in the general distribution, that results in the mines receiving them having the advantage. The ownership or use of the cars is immaterial. The purchase of coal may be no part of the performance of the carriers' function, but the distribution of cars is the performance of a public duty. It is the allotment and distribution of these cars in connection with the general distribution that results in the advantage. In the distribution of cars appellees act as common carriers, and in the performance of this duty they must act impartially, so that no discrimination will result. They must, irrespective of ownership or use, distribute *all* cars so that no discrimination results.

In the Pitcairn case the Circuit Court of Appeals said:

> "Therefore, the question of the ownership of the cars or the purposes for which they are used can have no bearing in this controversy."

It is contended by the appellee in cause No. 501 that 360 steel hopper bottom cars used by it for the transportation of its fuel supply are not available for general distribution, and that in any event the shipments in these cars should not be charged. The answer avers (No. 501 R., p. 22), that the failure to charge the shipments in these cars results in the same unlawful discriminations found to result from the failure to charge other company fuel cars, and this averment is admitted by the submission on bill and answer. If the right is recognized that carriers may own special equipment, and by failure to charge shipments therein confer all the unlawful advantages resulting from the failure to count other company fuel cars, the way is open for the carriers to evade the letter and purpose of the Act.

For the reasons assigned that company fuel cars shall be charged shipments in the steel hopper bottom cars should also be charged.

Rebates and discriminations in rates seldom, if ever, occur under existing conditions. The distribution of cars is a service or facility rendered to the operator. Discriminations are as much forbidden in practices and methods as in rates. Where the method or practice of distributing cars results in discrimination this method or practice is as much in violation of the Act as a discrimination in rates.

The decision of the Circuit Court announces the correct principle but applies the wrong remedy. If it is recognized that discrimination exists which is in violation of the Interstate Commerce Act, and it is within the power of the railroad company to prevent this discrimination, then the remedy

should go the full length and entirely do away with the discrimination. The Circuit Court found that discrimination results from the failure to consider or charge the company fuel cars, but the remedy suggested by it still permits of discrimination.

With the object in view of establishing railroad practices which will not discriminate, practices should be adopted which are not susceptible of abuse. Some practices are, through fraud and collusion, more likely to result in discrimination than others.

A railroad might consign cars ostensibly to be loaded with coal for its use and then divert the coal thus loaded to other uses. If the cars be not charged this fraud would be difficult of detection. If all cars loaded at a mine, by whomsoever owned and howsoever used, are charged against percentages, this opportunity for fraud is removed.

We submit that the appellees should charge the cars in which is loaded coal for their own use, to the end that the undue and unjust discrimination found to exist by the Commission and by the Circuit Court shall be eliminated, and that the mines loading company fuel cars shall be placed on an equality with the mines which do not load such cars.

d. There is not set forth in said bills of complaint or made part thereof as an exhibit, the report and opinion of the Commission, stating the grounds upon which it based the order in question;

(This point is covered by the argument under sub-head IV hereof.)

e. On the allegations in the bills of complaints and the denials and allegations of the answers, and particularly on the allegations marked "a", "b", "c", "d", "e" "f", and "g" in paragraph XIV, the finding and decree of the Circuit Court should have been in favor of appellant and the bills should have been dismissed;

(This point is covered by the argument under sub-heads I-a, b and c hereof.)

f. The Circuit Court should have held that the Commission has exclusive original jurisdiction over the subject matter of this action, and that until the Commission had determined the reasonableness of the railway practices involved the Circuit Court should not have entertained jurisdiction in the case of The Majestic Coal & Coke Co. vs. The Illinois Central Railroad Company (No. 502 R. p. 9).

The Illinois Central Railroad Company by its bill of complaint sets up, as a reason why the Circuit Court should not have entertained jurisdiction in its case, the action brought against it in the Circuit Court for the Northern District of Illinois by the Majestic Coal & Coke Co., in which a temporary injunction was granted prior to any finding or order by the Commission, restraining the railroad company from charging the cars as ordered by the Commission.

We submit that under the decision of this court in the case of the Railway Co. vs. Abilene Cotton Oil Co., 204 U. S., 350, the Commission has exclusive jurisdiction to determine

in the first instance the reasonableness of the railway practices involved.

By the provisions of Section 12 of the Interstate Commerce Act, the Commission is "authorized and required to execute and enforce the provisions of this Act."

Section 3 of the Act forbids "any undue or unreasonable preference or advantage to any particular person * * * or locality * * * in any respect whatsoever, or to subject any particular person * * * or locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 1 of the Act provides that "the term 'railroad,' as used in this Act, shall include * * * the road in use * * * all switches, spurs, tracks and terminal facilities of every kind * * * all freight depots, yards and ground * * * and the term 'transportation,' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, elevation and transfer in transit * * * and handling of property transported."

Section 15 of the Act provides "that the Commission is authorized and empowered, and it shall be its duty * * * to determine and prescribe * * * what regulation or practice in respect to such transportation is just, fair and reasonable." And further, that the Commission is authorized "to make an order that the carrier shall cease and desist from such violation * * * and (the carrier) shall conform to the regulation or practice so prescribed."

Section 6 of the Act, as amended June 29, 1906, after requiring the filing and posting of schedules, provides that the schedules shall state "all privileges or facilities granted or allowed and any rules or regulations which in any wise

change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, *or the value of the service rendered to the passenger, shipper or consignee.* * * * The provisions of this section shall apply to all traffic, *transportation* and facilities defined in this act."

By the terms of Section 1 transportation is held to include "all services in connection with the receipt, delivery * * * and handling of property transported."

Sections 1 and 6 construed together would seem clearly to require that all rules of practice such as the rating of mines and the distribution of cars, shall be filed and posted, as required by Section 6.

The requirement of Section 6 that the provisions of the section shall apply "to all traffic, transportation and facilities defined in this act," is also to be construed in connection with the provisions of the same section that "no change shall be made in the rates, fares and charges or joint fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid," and also with the further provisions of that section, "nor shall any carrier * * * extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff."

It seems clear that by these provisions of Section 6 railway practices affecting "privileges and facilities" in connection with "transportation" shall be scheduled, filed and posted, as required by the section.

It is evident by the provisions of Section 6 and 15 that the rules as to practices affecting privileges and facilities shall be maintained at a uniform standard, because Section 15 requires that such carriers "shall conform to the regulation or

practice so prescribed * * *" which "shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission."

The Interstate Commerce Act contemplates not merely that there shall be absolute equality between shippers, but also that there shall be uniformity. To accomplish these purposes the Commission, as an administrative body, was created, is directed to enforce the provisions of the law, and has authority to make findings as to rates and practices for all interstate carriers in the United States.

In the case of Railroad Company v. Interstate Commerce Commission, 200 U. S., 361, 391, this court, through Mr. Justice White, said:

> "It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."

In the case of Interstate Commerce Commission v. Reichman, 145 Fed., 235, in the Circuit Court for the Northern District of Illinois, Judge Landis said:

> "The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation and the Interstate Commerce Commission was created to secure the enforcement of those statutes."

And again, at page 239:

> "The law (the Interstate Commerce law) sought to establish a condition of absolute uniformity throughout the domain of interstate transportation, to the end that no man having freight to ship would be charged more than anybody else had to pay."

It has been held that "the purpose of this Act is to place 'all shippers on an absolute equality.'" U. S. ex rel. v. Norfolk & Western Railway Company, 143 Fed., 266 (C. C. A. Fourth Circuit).

The Commission may determine the reasonableness of a rate, and this authority in its original exercise has been held by the Supreme Court to be exclusive. It is the duty of the Commission to require the railroads to maintain uniform rates.

The Commission may order an interstate carrier to establish a regulation or practice. This order must be observed by the carrier and remains in force two years. It is the duty of the Commission to see that its orders are observed.

It is within the authority of the Commission, and it is its duty under the law to bring about the absolute equality between shippers and uniformity of operation, which are the objects of the act, and as it may on complaint, extend its ruling to other interstate carriers, which courts can not do, it is through the Commission that uniformity as to all interstate carriers and equality as to all their shippers may be accomplished.

That this is placing a large authority with the Commission was a matter of expediency for Congress to determine, is held in Railway Co. v. Abilene Cotton Oil Co., supra.

> "The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency."

In this case Mr. Justice White, at page 438, said:

> "By the ninth section of the act it was provided as follows: 'That any person or persons claiming to be damaged by any common carrier subject to the provisions of

this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for, he or they will adopt."

And again, at page 441:

"Nor is there merit in the contention that Section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible."

And again, at page 446:

"But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in Section 22 of the act to regulate commerce, viz.: '* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, can not in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself."

Section 9 specifically provides that any person may bring suit for the recovery of damages in any District or Circuit Court of the United States, and Section 22 provides that

nothing contained in the act shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the act shall be in addition to such remedies.

In the light of the reasoning of this court in the Abilene Cotton Oil Co. case, and in view of the considerations advanced for the conclusion reached in that case, it would seem that in order to establish the uniformity and equality which are the prime objects of the Interstate Commerce Act the Commission should have exclusive original jurisdiction over practices, as is held by the court it has over rates.

Mr. Justice White in the Abilene Cotton Oil Co. case, at page 447, said:

> "That the result of such long-continued uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act."

It may be claimed that the Abilene Cotton Oil Co. case is not applicable to railway practices, because schedules of rates are required to be filed and because the Supreme Court in that case emphasizes the purpose of the act to establish and maintain a standard of rates, but we have shown that under Section 6 rules of car distribution should be filed, and under Sections 6 and 15, considering the general purpose of the act, there should be uniformity as to railway practices

The several sections thus construed together show a condition to which the following language of Mr. Justice White, in the Abilene Cotton Oil Co. case, is applicable:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

In the case of Railway Co. v. Tift, 204 U. S., 709, the Supreme Court in no way detracts from the principles laid down in the Abilene Cotton Oil Company case, because in that case the parties had stipulated the court might pass upon the questions there submitted, and in fact the court did not pass upon them until after the Commission had made its findings. All jurisdictional questions in that case were waived as is pointed out by Mr. Justice McKenna.

If courts and juries are to pass upon the reasonableness of rates then the statement of Judge Shiras, in the case of Van Patten v. Railroad Co., 81 Fed., 545, is suggestive:

> "If the contention of plaintiff be sound, every schedule of rates posted by carriers under the provisions of

the act should have attached thereto the memorandum: 'Subject to change in accordance with the verdicts of juries which may hereafter be rendered.' "

If the courts may determine what shall be proper railway practices without previous action by the Commission, the results can not be better stated than they are stated by Mr. Justice White in the Abilene Cotton Oil Co. case where, at page 440, he says:

> "If, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without refer-

ence to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

In Riverdale Mining Co. vs. The B. & O. R. R. Co., retried in the U. S. Circuit Court, S. D. Ohio, Judge Sater directed a verdict for the defendant and dismissed the petition on the ground that a claim for damages for alleged discrimination in the distribution of cars should be presented to the Commission before the filing of an action thereon in the Circuit Court.

The present situation of the coal car distribution question in different parts of the country shows most forcibly how the uniformity sought to be accomplished by the law will not be accomplished if the Commission has not exclusive original jurisdiction.

In the Baltimore and Ohio Railroad Company case at Baltimore, and the Pennsylvania Railroad Company case in Pennsylvania, decided respectively by Judges Morris and Holland, the jurisdictional question was not raised.

In these cases somewhat conflicting judgments were entered. The judgments for the time being at least determined the rules of distribution as to the parties to the litigation. These judgments did not conclude other shippers on the same railroads. Actions for damages by operators other than the relators in those cases, subject to the uncertainties of verdicts by juries, might result in very different conclusions. These two railroads may as to other shippers be required by the order of the Commission to put in force reg-

ulations in opposition to the judgments of the courts in these cases. (As has been done in Rail & River Coal Co. vs. Baltimore & Ohio Railroad Co., 14 I. C. R., 86.) For failure to comply with such orders the railroads would be subject to the penalties of the Interstate Commerce Act, and by compliance as to the relators would subject themselves to punishment by the courts rendering the judgments. Failure to obey the order of the Commission as to the relators would result in discriminations as to other shippers.

In Ohio, The Hocking Valley Railway Company and The Wheeling and Lake Erie Railroad Company are distributing coal cars in conformity with the order of the Commission, and it will not be contended that coal operators may enjoin those roads from enforcing this rule of distribution, except by reviewing the order of the Commission in the manner provided by the act.

The Illinois Central Railroad Company in August, 1907, announced and proposed to enforce a rule of car distribution in conformity with the order of the Commission in the Ohio cases. The operation of this order was suspended by a temporary injunction granted in the case of the Majestic Coal and Coke Co. v. Illinois Central Railroad Co., wherein complainant, alleging it might by the operation of the order be deprived of the use of cars furnished by its consumers and by foreign railroads, and claiming that it had a direct advantage therefrom in the cost of producing its coal, prayed the protection of the court that it might retain the advantage it thus had from the arbitrary distribution to it of these individual and foreign railway fuel cars.

At Cincinnati, Judge Thompson, in the Riverdale Mining Co. case held that all cars coming on the railroad should be considered as available equipment.

In all parts of the United States railroad companies are enforcing rules of coal car distribution either in compliance or in conflict with the rule laid down by the Commission. Yet if they be enjoined from voluntarily establishing the rule as laid down by the Commission it will be impossible for the Commission to bring about uniformity in coal car distribution upon all railroads subject to the operation of the act.

Operators in different states and on different railroads are competitors in the same markets. If there be an advantage to an operator, to the disadvantage of operators on another railroad or in another state, owing to different rules of car distribution, then as between these competing operators there would be such advantages as would enrich the one and impoverish the others. A difference of from 5 to 20 cents per ton in the cost of production, as undoubtedly exists in many states from the operation of the differing rules of car distribution, means the success of one operator and the destruction of others.

It is submitted that the absolute equality between shippers and uniformity of operation on all interstate carriers, which are the prime objects of the Interstate Commerce Act, may be accomplished by giving exclusive original jurisdiction over railway rates and practices to the Commission, which may, as courts can not, make the operation of its orders uniform, and that this is the proper construction of the act.

It must be recognized that before the decision in the Abilene Cotton Oil Company case it was generally accepted that both courts of law and equity had jurisdiction over controversies under the Interstate Commerce Act, and that such jurisdiction was frequently exercised by the courts. It must also be recognized that the Supreme Court has now limited the original jurisdiction of the courts by the decision in the Abilene Cotton Oil Company case as to all matters to which the reasoning of

the Supreme Court in that case applies. If to recognize original jurisdiction in the courts results in discrimination, then, as was said in the Abilene Cotton Oil Company case, the act can not be held to destroy itself.

If at the instance of a shipper courts of equity shall exercise jurisdiction to enjoin discriminations in railway practices, at the instance of a shipper, similar conditions will exist as to railway practices. That discrimination in car distribution actually exists from the fact that several courts have now assumed to and have exercised this jurisdiction, must be admitted.

II

The Circuit Court erred in holding that each of the complainants respectively were "entitled to an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands it to count its own cars that are being employed in hauling its own fuel as available commercial equipment."

(This point is covered by the argument under sub-head I-c hereof.)

III

The Circuit Court erred in granting an injunction against the enforcement of that part of the Commission's order which commanded each of the complainants respectively "to count its own cars that are being employed by it in hauling its own fuel as available commercial equipment."

(This point is covered by the argument under sub-head I-c hereof.)

IV

It is presumed that the order of the Commission was properly made, and as upon the admissions in bills and answers the discrimination complained of is admitted, the burden was upon appellees to show that this discrimination was justified.

In Railroad Co. vs. Behlmer, 175 U. S., 647, Mr. Justice White said that the Interstate Commerce Commission "from the nature of its organization and the duties imposed upon it by the statutes is peculiarly competent to pass upon all questions of fact of the character here arising."

In Railway Co. vs. Commission, 99 Fed., 52, Judge Taft, at page 64, said:

> "It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances, than courts. This can not be conceded, so far as it relates to the Interstate Commerce Commission, which by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the federal court."

This statement has been approved in

> Commission vs. Railroad Co., 118 Fed., 613;
> Commission vs. Southern Pacific Co., 123 Fed., 597;
> Tift vs. Railway Co., 138 Fed., 753.

The Commission is an administrative body, with quasi judicial functions, and by reason of the experience and training of its members is presumed to be qualified to pass upon the questions involved in the cases at bar. Its investigations are not ex parte, but are conducted within the lines of pleadings filed by the respective parties, and with the opportunity to all parties to present such evidence as they may see fit to adduce. The decisions of the Commission as announced in

its reports are accepted as the expressions of a quasi judicial tribunal, respected for the experience and training of its members.

By the amendment of June 29, 1906, the former provision of Section 14 of the Act that the findings of the Commission shall "be deemed prima facie evidence as to each and every fact found" has been omitted, yet this does not substantially change the effect to be given to the findings and orders of the Commission.

An order of the Commission becomes operative unless an action is brought against it to enjoin, set aside, annul or suspend the order or requirement, the Commission being the defendant in such actions and the complainant being the aggrieved party in the proceedings before it. The complainant undoubtedly assumes the burden of proof to establish and maintain that the order of the Commission should be suspended, modified or set aside, and is required to sustain his contentions by more than a mere preponderance of the evidence.

In Origet vs. Hedden, 155 U. S., 229, Chief Justice Fuller said:

> "The presumption is that a sworn officer, acting in the discharge of his duty, upon a subject over which jurisdiction is given him, has acted rightly."

This principle is recognized in numerous decisions by this court and is axiomatic.

In Commission vs. Railroad Co., 102 Fed., 709, although referring to the former provision that the findings of the Commission shall be prima facie evidence, yet aptly states the rule, which it is believed applies irrespective of statutory provision, "the conclusions of the Commission based upon such findings are presumed to be well founded and correct, and they will not be set aside unless error clearly appears."

Complainants' bills do not set forth the report and opinion of the Commission in the original cases pending before it, nor do they refer to the evidence introduced on the hearing before the Commission. It is not alleged that the order of the Commission was not justified by the weight of the evidence before it, or that complainants have discovered and are prepared to adduce any new or additional testimony to that adduced before the Commission.

These cases were submitted to the Circuit Court upon the bills and answers, and appellees have not adduced *facts* sufficient to overcome the presumption that the findings and orders are lawful. No facts are alleged in the bills upon which to base the contention that the findings and orders of the Commission are unreasonable and unlawful, and the naked proposition is submitted as to whether the appellees may lawfully refuse to charge or consider company fuel cars in their general distributions, when it stands admitted that the failure to so charge or consider the cars results in discriminations as between the shippers who receive such cars and those who do not receive them.

It is stated in Richmond Elevator Co. vs. Railroad Co., X I. C. R., 629, that where discrimination in substantial degree appears "the burden of proof is upon the complainant to the extent of showing discrimination, and then upon the carrier to show that the discrimination was justified." This is an established rule of procedure before the Commission.

In the Pitcairn case, the Circuit Court of Appeals said where the desired facilities have not been furnished the burden is on the carrier "to show that it is pro rating its cars fairly and equally."

It is not every discrimination that is unlawful, but it is a proper rule that when discrimination in substantial degree

appears the burden is upon the carrier to show that such discrimination is lawful.

Appellees fail to justify the discrimination which is admitted in the record, resulting from their method of allotting company fuel cars.

It is to be determined whether appellees may maintain a method of car distribution which confers substantial advantages upon some mine operators to the disadvantage of others, and may justify this discrimination by the plea that they are thereby enabled to purchase their fuel supplies at lower prices.

CONCLUSION.

An unfair railway practice will result in discrimination as unjust and as injurious as follows from direct rebates in rates. It lies within the power of the carrier to avoid all discriminatory results of its practices, and it is its duty to perform its functions as a quasi public agent so that there shall be no unjust discrimination.

As a private corporation, in the administration of its internal affairs, a railroad company may gain advantages and drive bargains as may any individual. As a public agent, in the performance of its duty as a common carrier, it must scrupulously avoid all unjust and unreasonable discriminations. When there is a relation between its acts as a private corporation and its acts as a public agent it may not gain the advantages which it as a private corporation might otherwise obtain, by the violation of its duty as a public agent.

In the cases at bar it is admitted that the appellees' method of allotting company fuel cars results in advantages to the mines at which these cars are loaded and to the disadvantage of the mines which do not receive these cars. There

can be no explanation or justification of this practice except that by the method of distributing cars the appellees are enabled to purchase their fuel supplies at lower prices.

The Circuit Court found that the order of the Commission as to private cars and foreign railway fuel cars was reasonable and lawful but, while finding there is an advantage from the method of distributing company fuel cars, suggested that company fuel shipments should be deducted from the mine ratings rather than be charged in the general distribution against the mines loading them. The Circuit Court found that discrimination results from the method of distributing company fuel cars and that appellees should apply a remedy to remove this discrimination, but the remedy suggested only in part takes away the advantage to the mine loading the company fuel. It is submitted that if undue discrimination is found a remedy should be applied that entirely removes this discrimination.

The result of the courts having assumed jurisdiction over railway practices has been shown. Instead of uniformity in these railway practices, we find that there is great conflict, owing to the assumption of jurisdiction by the courts without previous action by the Commission. The practice involved is one of many, and similar conflicts will result as to other practices if the courts are held to have jurisdiction prior to the making of an order by the Commission.

The question of jurisdiction of the courts and the Commission, as applied to the practical administration of the Interstate Commerce Act and to secure the purposes of the act, is one of the most important questions now open for determination in the construction of the act.

It is submitted that the order of the Commission was reasonable and lawful and that the bills of appellants should have been found to be without equity and should have been

dismissed, and that upon the averments of the bill of the Illinois Central Railroad Company as to the pendency of the action of the Majestic Coal and Coke Company the Circuit Court should have held that it did not have jurisdiction to grant relief prior to the finding and order of the Commission.

Respectfully submitted,

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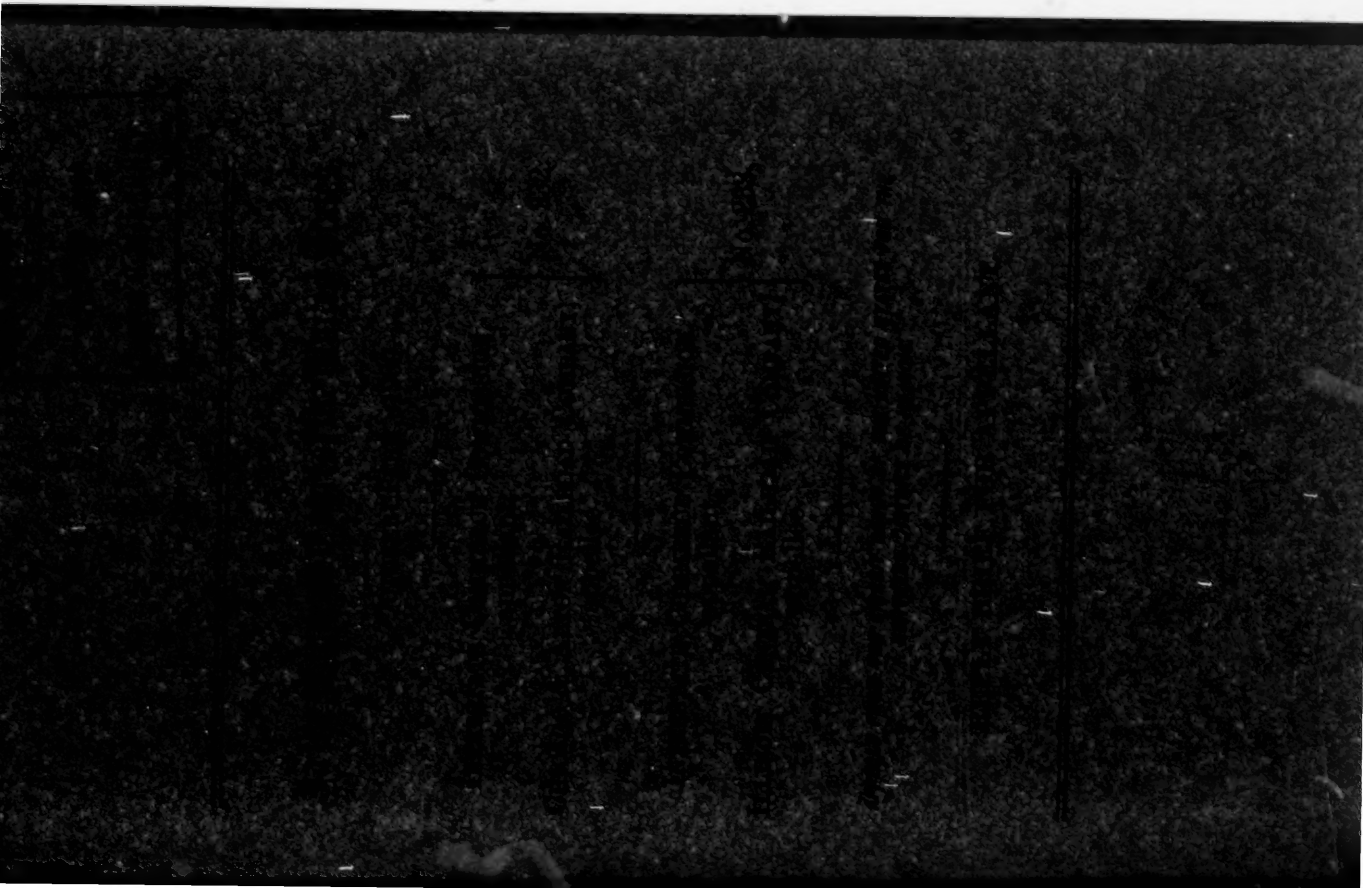

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

INTERSTATE COMMERCE COMMISSION, appellant, *v.* CHICAGO & ALTON RAILROAD COMPANY, appellee.	No. 232.
INTERSTATE COMMERCE COMMISSION, appellant, *v.* ILLINOIS CENTRAL RAILROAD COMPANY, appellee.	No. 233.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT.

Appellees' statement of facts, in their brief and argument, goes far beyond the record in this case and contains matter of which this court can not take judicial notice. As we understand the practice and the law, these cases are to be determined by this court upon bill and answer, the record made in the court below. That we may correctly give the court a fair statement of the case, we repeat some of the matters contained in appellant's original brief.

The Interstate Commerce Commission, upon the complaint of the Illinois Collieries Company (prosecuted to a conclusion before the Commission by Glenn W. Traer, receiver of the original complainant) after answers, hearings, and full investigations, made an order April 13, 1908, requiring the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company to establish, on or before July 1, 1908, and during a period of at least two years thereafter to maintain in force a practice or regulation which should take into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal.

Appellees herein filed their several bills of complaint in the Circuit Court of the United States within and for the Northern District of Illinois, June 1, 1908, praying that court to set aside and annul said order of the Interstate Commerce Commission and perpetually to enjoin the enforcement of said order.

On June 8, 1908, the Attorney-General, in accordance with the act of February 11, 1903, commonly known as the "Expediting act," filed in each of said suits a certificate that said causes were of public importance and requested that the suits be assigned

for hearing before not less than three of the circuit judges.

On June 11, 1908, appellant herein filed its answers to the bills of complaint. The causes came on for argument and were submitted together, for final decree, upon bill and answer.

Thereafter, on June 30, 1908, the court entered its decree enjoining that portion of the order which required appellees to take into consideration cars used by appellees for their own several fuel supplies. From said decree the Commission prosecutes its appeal to this court.

Wherever the averments of the answer conflict with the averments of the bill, the averments of the answer are admitted as the true facts in the case. This, we understand, is the well-established rule of practice where, in equity, the case is submitted upon bill and answer for final decree.

Paragraph XI of the answer, record No. 501, page 17, and Paragraph XII, record No. 502, page 28, show that there was a hearing, in accordance with the act to regulate commerce, after a complaint and answer, a report by the Commission, an order and the serving of said order upon the defendants before the Commission.

In Paragraph XIII of the answers, record No. 501, page 18, record No. 502, page 29, the Commission denies that the order complained of was, in the respect set forth in the bill unjust, unreasonable, oppressive, or unlawful; and averred that the allotment of cars for fuel supply in addition to the full distributive

share of the mines receiving such cars in the general distribution of cars by the complainants (appellees herein) results in an unjust, unreasonable, and unlawful discrimination, in violation of the provisions of the act to regulate commerce.

In paragraph XIV of the answer, Record No. 501, page 20, and No. 502, page 30, the Commission avers that the allotment by complainants (appellees herein) of foreign railway fuel cars, private cars, and complainants' fuel cars to the mines receiving such cars in addition to the full distributive shares of such mines in the general distribution of cars by complainants, and the failure by complainants to count said three classes of cars against the mines receiving them, in the general distribution of cars, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars, and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(*a*) The operator receiving the foreign railway fuel cars, private cars, or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity not receiving such cars.

(*b*) The operator receiving such cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(*c*) The operator receiving such cars is enabled to increase the number of working places in the mine, to

develop his mine more rapidly, to increase his capacity rating, and in future reratings would receive a higher rating and consequently a larger number of cars in complainants' general distribution of cars.

(*d*) The operator receiving such cars is enabled to secure and hold a larger, more efficient, and regular working force of miners and laborers.

(*e*) The development of the mines not receiving such cars is retarded in inverse ratio as the development of the mines receiving such cars is accelerated.

(*f*) By the arbitrary allotment of such cars complainants (appellees herein) are enabled to secure low prices on railway fuel, because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such cars.

(*g*) The operator receiving such cars is thereby enabled to make contracts for the delivery of coal during a long period to an extent that the operator of mines not receiving such cars can not do.

In the same paragraph of the answer it is further averred that the advantage to the operator receiving such cars in addition to the full distributive share of cars available, enables such operator to produce all the coal mined by him at a cost of from 5 cents to 20 cents per ton less than the cost to the operator not receiving such cars; that complainants and other railroads have been and are enabled to purchase their fuel coal at prices from 5 cents to 20 cents per ton less than the prevailing market prices on commercial coal, by reason of the arbitrary allotment

of such cars to the operators having contracts for the supply of railroad coal; that by reason of the arbitrary allotment of such cars the mines receiving them are enabled to produce commercial coal at from 5 cents to 20 cents per ton less than the cost of production at mines not receiving such cars, thereby obtaining an undue and unreasonable advantage over operators not receiving such cars in the marketing of commercial coal; and that complainants (appellees herein) urge and insist upon the arbitrary allotment of foreign railway fuel cars and company fuel cars, in order that they may purchase their several supplies of railway fuel coal at prices lower than the market prices on commercial coal. Upon the record in the court below, which contained the aforesaid facts, the Circuit Court, in rendering its opinion (record No. 501, page 55, and record No. 502, page 63), held, in effect, that while the fuel cars of complainant do affect the problem of the equitable distribution of commercial equipment, still, inasmuch as such cars are not used in commerce, it was erroneous on the part of the Commission to require complainants to take account of cars used in hauling their own fuel.

ARGUMENT.

At the outset we earnestly urge on this court that it approach the consideration of this case mindful of the fact that here is an effort to set aside and enjoin an action of an administrative tribunal charged with a duty under the statute and that every pre-

sumption of validity attaches to the order. We believe the true rule to be this, that the court will refuse to interfere with an order resulting from the exercise of discretion by an administrative tribunal charged with a legislative duty and clothed with the power of removing such discriminations practiced by carriers in connection with the interstate transportation of property as, after full investigation pursuant to complaint filed in its office, that tribunal concludes are undue and unreasonable; and the court will so refuse, regardless of whether or not, as an original proposition, it would have formed an opinion in consonance with the decision of said tribunal. In other words, the court will not substitute its own judgment for the judgment of the regulating tribunal, because to do so would be contrary to the spirit, if not the letter, of the act to regulate commerce. The court will refuse to suspend or set aside an order of such tribunal, if it finds the order is authorized by the law under which the tribunal operates and does not exceed the limits of a reasonable exercise of the power conferred by the statute.

Experience has demonstrated that effective regulation of common carriers engaged in the interstate transportation of passengers and property, without uniformity of such regulation, could not be established or maintained; and uniformity would be absolutely impossible if different tribunals were to pass upon the same facts and circumstances and *for the same purpose*, because conflicting orders concerning the same matters would be the inevitable result.

General rules to be observed by such common carriers in connection with the interstate transportation of passengers and property over the carriers' lines of railway have been prescribed in the act to regulate commerce, and the Congress has imposed upon the Commission the duty of applying and enforcing such rules. The Congress has also clothed the Commission with the necessary power and given it a right to use discretion in the premises. Among such rules are those prescribed by the first paragraph of section 3 of said act, making it unlawful for a carrier to give undue preference to, or to subject to undue prejudice, any party, locality, or particular description of traffic. In this case we have shown that appellees fail to take into account in coal-car distribution company fuel cars, thereby giving an undue advantage to operators using such cars and subjecting their competitors who have not such cars to undue prejudice; that this discrimination was complained of in the petition filed by the Illinois Collieries Company in the office of the Commission; that after an answer to said complaint, said discrimination was fully investigated by the Commission in a proceeding wherein the appellees herein were given full opportunity to appear and defend their action in the premises; that after said investigation the Commission made a report, which included its conclusions, decision, order, and requirement in the premises; that in said order the Commission expressed the opinion that said discrimination was unjust and that the advantage given to the operator receiving

company fuel cars was undue and unreasonable; and that by said order the Commission required appellees to remove said discrimination and undue preference and advantage, by taking into consideration and account company fuel cars in the matter of car distribution.

In making said order, therefore, it is clear that the Commission has fully complied with all the requirements of the statute under which it operates. Unless the appellees show clearly to this court that the Commission's action exceeded the authority conferred upon it by the provisions of said act, or is in effect a denial of due process of law, this court will refuse to interfere with the Commission's requirement in the premises.

The findings of fact by a tribunal created by law and charged with the performance of a certain duty, legislative in character, will not be set aside by the court unless there is no evidence whatever to support such findings. The question whether certain charges are reasonable or otherwise, and whether certain discriminations are due or undue, are questions of fact, to be passed upon by the Commission in the light of all the facts alleged and supported by competent evidence, and it does not comport with the true scheme of the statute that the court should of its own motion find and pass upon such questions of fact.

In *East Tennessee V. & G. Railway Company* v. *Interstate Commerce Commission* (99 Fed. Rep., 52),

the Circuit Court of Appeals consisting of Harlan, circuit justice, and Taft and Lurton, circuit judges, Taft, writing the opinion, said:

> It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and to decide what discriminations are justified by the circumstances than courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the federal court.

That due process of law does not necessarily require the interference of the judicial power is the settled law of the land. *Public Clearing House* v. *Coyne*, 194 U. S., 497. By a statute of the United States it was provided that the Postmaster-General could "upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift, enterprise, or scheme for the distribution of money, or of any real or personal property by lot, etc.," instruct postmasters at any post-office at which registered letters arrive to return all such letters with the word "fraudulent" stamped upon the outside. In accordance with the statute the Postmaster-General issued a fraud order against the public clearing house. The constitutionality of the action of the Postmaster-General was attacked upon these among other grounds:

1. Because no judicial hearing upon the question of illegality was provided, and

2. Because the Postmaster-General was empowered to confiscate the money of a private citizen.

Mr. Justice Brown delivered the opinion of the court, and at page 508 said:

> It is too late to argue that due process is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & Guild Co.* v. *Payne*, 194 U. S., 106. That due process of law does not require necessarily the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. * * * If the ordinary daily transactions of the departments, which involve an interference with private rights were required to be submitted to the courts before action was finally taken the result would entail practically a suspension of some of the most important functions of government.

In *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S., 321, this court ruled that the findings of the Land Department in all questions were conclusive although the proceedings involved the exercise of the judicial power.

> Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it can not be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts except in those cases of fraud, etc., which permit any determination to be reexamined.

In the case of *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 324, speaking of the head of an executive department, the court said:

> Whether he decided right or wrong is not the question. Having the jurisdiction to decide at all he had the necessary jurisdiction, and it was his duty to decide as he thought the law was; and the courts have no power whatever, under these circumstances, to review his determination by mandamus or injunction.

In the immigration cases it is well established that as to any person applying for or seeking entrance to this country due process of law does not necessarily require a judicial trial. Congress may intrust the decision of the right of such person to enter this country to an executive officer and his decision is conclusive. (*United States* v. *Ju Toy*, 198 U. S., 253.)

The compelling of railway companies to comply with the order of railroad commissioners regulating rates is due process of law.

8 Am. & Eng. Enc. of Law, 911.

C. M. & St. P. R. Co. v. *Becker*, 32 Fed. Rep., 849.

L. & N. R. R. Co. v. *Railroad Commission*, 19 Fed. Rep., 679; 16 Am. & Eng. R. Cas. 1.

R. R. Com. v. *Ore. R. & N. Co.*, 17 Ore., 65; 2 L. R. A., 195; 35 Am. & Eng. R. Cas., 542.

State ex rel. Railroad & Wh. Com. v. *C. M. & St. P. R. R. Co.*, 38 Minn., 281; 37 N. W., 782.

Stone v. *Natchez, J. & C. R. Co.*, 62 Miss., 646.

Stone v. *Farm. L. & T. Co.*, 116 U. S., 307; 29 L. Ed., 636.

State ex rel. Board of Transportation v. *Fremont, E. & M. Val. R. Co.*, 22 Nebr., 313; 32 Am. & Eng. R. Cas., 426.

People v. *N. Y. L. E. & W. R. Co.*, 104 N. Y., 58.

State v. *New Haven & N. R. Co.*, 37 Conn., 153.

So that the rule appears to be settled that where the decision of questions of fact is accorded by Congress to the judgment and discretion of the head of a department his decision thereon is conclusive; and that even upon questions of law and fact or of law alone, his action will carry with it a strong presumption of its correctness, and courts will not ordinarily review it.

We believe the foregoing to be the true rule to be observed by all courts in determining questions as to the lawfulness of the Commission's orders in suits

brought to enjoin such orders in accordance with section 16 of the act to regulate commerce.

Fuel cars should be counted as a matter of equity and justice between the railroad and coal operators upon its line.

In the bill of complaint and in the argument in this court appellees attempt to treat this question as purely commercial, having nothing to do with transportation. It is urged by them that a railroad company may buy its fuel supply wherever it sees fit and at the best price it can; that it may receive its supply at the mine tipple or at any point upon its line where it is to be used, without reference to the necessities of private shippers; that the purchase and transportation of its coal used exclusively for fuel purposes is in no way connected with the transportation of commercial coal; and therefore that discrimination can not be predicated upon the manner in which the railroad company places its orders for fuel coal or uses its cars in the handling of that coal.

With part of this argument we have no quarrel. A railroad company certainly may purchase its fuel supply wherever it elects. It may distribute its orders among the different mines upon its line or it may place them with a single mine, and may do so for the purpose of obtaining fuel at the lowest possible price. It may use its cars for the transportation of its fuel coal, even though it is able to furnish no cars for the transportation of commercial coal. It can be guilty of no discrimination against operators

upon its line solely by reason of the fact that it uses its equipment first of all for the transportation of its own fuel.

But whenever a railroad is unable to furnish the equipment which it should furnish and when its failure of duty in that respect, taken in connection with its failure to count cars used in the movement of its own fuel, results in a discrimination against the operator who has not the fuel cars, in that event the railroad may be required to count these cars, as the only means by which the result of its failure to perform its duty in the furnishing of cars can be minimized. A carrier must not be allowed to profit by its failure to perform its duty when that can be prevented by the counting of fuel cars.

In case No. 501 it is suggested that the Chicago & Alton Railroad Company has provided 360 special coal cars which can only be used in the handling of fuel coal, as no shipper on that road has a coal trestle where such hopper-bottom cars can be unloaded, the sides being too high for shoveling coal from the car. It is a very exceptional condition, if it be true that no consignees upon the line of the Alton road have facilities for unloading such cars. This court knows that the coal companies in all the large commercial centers and the large consumers of coal have trestles through which coal is dumped from hopper-bottom cars. This case, therefore, is to be disposed of upon the theory that the equipment used in the handling of fuel coal is simply a part of the general coal equipment of the railroad. The car to-day moving fuel

coal may have been yesterday, or may be to-morrow, used in carrying commercial coal. No distinction is or can be made between the use of cars and equipment for commercial purposes and for fuel purposes, so far as the supply of available cars is concerned.

To show the effect upon the business of competing operators caused by the system of car distribution controlled by the order of the Commission, as modified by the circuit court, if appellees adopt the suggestion of the court, we submit the following example:

It is recognized that a coal mine should be operated the entire year. Machinery, working force, and the various essential elements which go to make up successful mining operations require continuous operation of the mine. In a commercial way the demand for coal is much greater in the winter than in the summer, with resulting higher prices in the winter than in the summer. If a contract can be made for a regular daily output throughout the year, the operator can and does make a much lower price than would be received for coal sold during the winter. Bearing this condition in mind, let us take three mines, known as numbers 1, 2, and 3, all lying upon the line of the Illinois Central Railroad, each of these mines having the same daily capacity of 50 cars.

Mine No. 1 has a contract with the Illinois Central whereby 25 cars daily throughout the year are to be taken from that mine by the Illinois Central. Mine No. 2 has a contract with the Wabash Railroad (which has no coal mines upon its line) for 25 cars daily throughout the year for the fuel supply of that

railroad. Mine No. 3 has a contract with the municipality of Chicago for 25 cars daily throughout the year. The Illinois Central provides its own cars for the handling of its 25 cars of coal; the Wabash Railroad sends daily 25 cars from its own line on to the Illinois Central line for the loading of the 25 cars of coal which it takes from mine No. 2; the supply for the municipality of Chicago must be transported in the commercial equipment of the Illinois Central. Now it is evident that each one of these contracts is equally desirable; the amount is the same, the regularity of consumption is the same, the certainty of payment is the same. There is no reason why a coal operator would take one of these contracts at a less price per ton than the other, provided only that such operator is certain that he will always have sufficient cars into which to load the output of his mine.

Let us assume now that for six months in the year there is a car shortage on the Illinois Central and that railroad is able to furnish only 50 per cent of the cars which are demanded; and let us see what then the effect is upon the mines having these different contracts.

The order of the court below counts in the car distribution the cars assigned from foreign railways, but does not count the cars loaded with Illinois Central fuel coal. The mine rating for mine No. 1, which furnishes the Illinois Central coal, is counted on the basis of 25 cars daily, that being the remaining capacity of the mine after deducting the amount taken by the Illinois Central for its own supply.

Mine No. 1 receives daily during the six months of car shortage its 25 fuel cars and 50 per cent of 25 cars, or 12 cars, a total of 37 cars daily. Mine No. 2, having the Wabash contract, receives regularly 25 cars per day and nothing more—that is, it receives its 50 per cent of its daily capacity. Mine No. 3, which has the contract with the municipality of Chicago, receives daily 50 per cent of its capacity, or 25 cars.

These three contracts, which run throughout the entire year, would be filled by any mine operator for practically the cost of producing coal, which, we assume, is $1 per ton. Commercial coal, on an average during a winter season, sells for $1.50 per ton. Under this supposed case, therefore, mine No. 2, with the Wabash contract, would make nothing; mine No. 3, with the Chicago contract, would make nothing; but mine No. 1, with the Illinois Central contract, and with its 12 cars for the shipment of commercial coal during the period of coal-car shortage, would make a profit of 50 cents per ton on each of the 12 carloads per day. On an average of 40 tons to the car, this mine, during those six months of car shortage, would make daily a profit of $240, while its two competitors would make nothing at all.

We assure the court that this illustration of the practical operation under the rules of car distribution in force under the decree of the Circuit Court is not fanciful and is not exceptional, but thoroughly illustrates conditions as they exist in the great coal mining and producing regions of the United States.

The rule of car distribution laid down by this court in this case will be the rule not alone of the Illinois Central and the Chicago & Alton, but of all the coal-carrying roads in the country; this includes the Baltimore & Ohio and the Pennsylvania, which traverse the vast Appalachian coal fields.

The effect of this discrimination is twofold. It prefers the operator who has the fuel contract to his competitor. It enables the railroad to purchase its coal cheaper than it otherwise could because the operator is willing to give to the railroad a reduction on the price per ton so long as that reduction is only a part of the profit which he is enabled to make on his commercial coal by reason of the fact that he has these company fuel cars without their being charged against his distributive share of equipment. It should be borne in mind that so long as the Illinois Central Railroad Company does its duty and furnishes a full supply of cars it can buy its coal no cheaper than the Wabash Railroad and no cheaper than the city of Chicago. It is when, and only when, it falls short of its duty, that it can purchase its fuel at a better price from the mine upon its own line than either the Wabash Railroad or the city of Chicago, and the reduction in price to the Illinois Central is measured by the extent that the Illinois Central fails to discharge its duty toward the coal shippers.

The only safe rule is this: Wherever coal is subject to transportation by a railroad before reaching the point of consumption no distinction can be made

between fuel coal and other coal, and no distinction can be made between fuel cars and other cars, with the single limitation that the railroad has, under all circumstances, the right to use whatever of its equipment may be necessary to secure its own fuel. This rule does not interfere with the right of the railroad to purchase its coal wherever it sees fit and at a fair bargaining price. It does not encroach on the right of the railroad to use any or all of its equipment in the providing of its own fuel supply.

Objection is made to this rule by shipper and by railroad; but the only shipper who objects to this rule is the shipper with the fuel contract with the railroad company where the fuel cars are not counted in car distribution, because he, the operator with the fuel contract, has an advantage over his competitors who have not such a contract. The railroad objects because if the fuel cars are not counted it can purchase its coal cheaper than it could if they are counted; it gets a portion of the advantage which accrues to the operator over his competitors by reason of the non-counting of these fuel cars. We submit that a court of equity should not, by its decree, permit a carrier to take advantage of its own neglect of duty in furnishing cars by purchasing its fuel at a lower figure than it could were it not for the rule which the carrier opposes.

The question, concisely and succinctly stated, is this: Shall a railroad company be allowed to take advantage of its own failure of duty, to force down the price of its fuel coal?

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION TO MAKE THE ORDER COMPLAINED OF.

The order of the Commission is restricted to interstate commerce.

The order of the Commission is divided into two parts. The first part of the order is to cease and desist; the second part is to establish and maintain. In the portion of the order requiring the carriers to cease and desist from maintaining and enforcing the present practice of failing to make account of the three classes of cars, the limitation is made to "the distribution of coal cars for or affecting interstate shipments of coal among the various coal operators along their lines." The order to establish and maintain a practice or regulation of taking into consideration the three classes of cars is limited to "the distribution of coal cars among the various coal operators along their lines for or as affecting interstate shipments of coal."

It is thus apparent, on the face of the order, that the subject of the order of the Commission was the distribution of cars for interstate shipments of coal. Therefore the facts admitted in this record show that the counting or noncounting of cars placed at mines does affect the shipments in interstate commerce carried by appellees herein. To go further, an effective system of car distribution as the basis of transportation, both interstate and intrastate, as conducted by the appellees herein, must be absolutely uniform. There can not be one rule for interstate shipments and another rule, conflicting with the former, as to the intrastate shipments of coal.

The Circuit Court of Appeals for the Northern District of Illinois in a recent decision, the *Wabash Railroad Company* v. *United States* and *Elgin, Joliet & Eastern Railroad Company* v. *United States* (not yet reported), held that as to matters of car equipment, couplers, grab irons, and air brakes, there can be but one regulating authority; and if the highway or line of railroad is used for interstate commerce the carrier engaged in such commerce on such railroad must have all its equipment, whether loaded with state or intrastate traffic, equipped as the federal statute directs.

We therefore submit that commercial conditions and transportation conditions alike demand a uniform system of car distribution. That uniform system can only be prescribed by national authority.

The act to regulate commerce gives the Commission jurisdiction to prescribe a regulation providing for a system of car distribution in lieu of a system of car distribution already in force found by the Commission to be unjust and unreasonable by reason of undue preference or prejudice.

Prior to the passage of the amendment of June 29, 1906, to the act to regulate commerce, the Commission was required, in any case in which it made an investigation, if it appeared that "anything has been done or omitted to be done in violation of the provisions of this act * * * it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier to cease and desist from such violation * * *." In other words, if section 3 of the original act to regulate commerce (which was un-

changed by the Hepburn Act) was found to be violated by a certain carrier, after a complaint and investigation, the Commission was authorized to give "notice to said common carrier to cease and desist from such violation."

If the contention made by appellees in their brief, that under section 15 of the act the Commission can only prescribe a regulation affecting rates in the sense urged by counsel for appellees, then the Hepburn amendment has restricted the power of the Commission to correct unlawful preferences and prejudices.

Section 15 is not the only provision of the act to regulate commerce, as amended, which gives the Commission power to make orders.

Section 12 of the act to regulate commerce, as amended, provides:

> And the Commission is hereby authorized and required to execute and enforce the provisions of this act.

Section 13 provides that any person, etc., "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof may apply to said Commission by petition, which shall briefly state the facts." The same section further provides that if the carrier fails to satisfy such complaint, "it shall be the duty of the Commission to investigate the matters complained of, in such manner and by such means as it shall deem proper."

Section 14 provides:

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises.

So that if there were no provision in section 15 for an order by the Commission other than that covered by sections 12, 13, and 14, the Commission could make an order requiring the carriers to cease and desist from maintaining a discrimination which the Commission found to be unlawful under section 3 of the act to regulate commerce.

But, aside from the sections of the statute just referred to, section 15, which is the section of the new statute which confers the rate-making power upon the Commission and provides specifically for the making of rules and regulations to bring about the great results intended to be secured by the Congress in enacting the amendment of June 29, 1906, is sufficient. That portion of the section which is applicable to the situation in this case is as follows:

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act, for the transporta-

> tion of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

It is urged by appellees that the Commission can only make a regulation which is one "affecting rates." In several cases before the Commission, where carriers have raised the question of jurisdiction when a regulation or practice has been assailed on complaint as unjust or unreasonable, the Commission has uniformly held that it has jurisdiction to inquire into whether such regulations are unjust or unreasonable, if the regulations and practices complained of are ones under which the transportation of interstate traffic is conducted. Perhaps the leading decision by the Commission is the case of *Rail &*

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River Coal Company v. *B. & O. Railroad Co.* (14 I. C. C. Rep., 86), in which Commissioner Harlan deals at length with the question of jurisdiction.

The question as to the Commission's jurisdiction to prescribe a regulation in lieu of one found unreasonable, similar to the one involved in this case, is of the greatest importance. If the definition of what regulations or practices affect rates as given by counsel for the appellees be correct, and the construction of section 15 as given by counsel in the brief for appellees is the proper construction, then the power of the Commission to protect the shipping public against abuses is much less extensive than has generally been understood. There can be no more insidious or effective method by which a carrier may discriminate between its shippers than through a regulation or practice which denies to shippers the equal enjoyment of the carrier's facilities. If the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers during periods of car shortage lies largely in the hands of the carriers over whose lines they conduct their business enterprises, whenever such carriers are disposed to, and actually do, favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, and denying to his competitor the share to which he is entitled, the business of the one is encouraged and built up, while the business of the other is discouraged, perhaps destroyed. The reports and decisions of the Commission demonstrate that in many cases the Com-

mission has exercised the very power which it is here urged by appellees is not given to the Commission.

The underlying purpose of the act to regulate commerce and the acts amendatory thereof was to put shippers on a basis of absolute equality; to insure to them not only equal rates, but an impartial enjoyment of the facilities and services of interstate carriers. That principle appears throughout the act. Especially does it appear in sections 2 and 3, the former assuring to shippers an equality of rates in the transportation of property under substantially similar circumstances and conditions, the latter assuring to them an equality of opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality of rates, without an equal opportunity to use the facilities of carriers, would fall far short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment in the transportation of their merchandise by carriers would mean little to shippers if not accompanied by an assurance of an equality also in rates.

Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise would be to put the narrowest possible construction upon those words and to disregard the general purposes of the enactment. We know of no recog-

nized rule of statutory construction which would authorize such a holding, and especially when we are construing a remedial statute. Certainly the Congress never intended to give the shipper a tribunal before which he could obtain just and reasonable rates and deny to that shipper the right to go to a tribunal with power to redress the great wrongs which may be done such shipper through unjust and discriminatory regulations and practices. Section 3 of the act clearly renders unlawful the giving of undue preference or undue prejudice to any shipper. If it be possible, without doing violence to the language of the act, such a construction must be given to the act as will remove the unlawful preference or prejudice.

We believe that each part of the provision in section 15 which we have quoted has a necessary relation to the remainder of that provision; that the words "regluations and practices affecting rates" and "in respect to such transportation" are used in the same sense. When both phrases are considered together and the whole clause is read in the light of the great purposes underlying the act, there is little difficulty in reaching the conclusion that the words "any regulation or practice whatsoever * * * affecting rates" are used synonymously with the words "regulation or practice in respect to such transportation," and that both phrases are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and

conduct their transportation. This construction, when adopted, permits the Commission to carry out the intent of the Congress and to require carriers to cease and desist from the violations of the statute, particularly section 3 thereof, and will compel the carrier to adopt, in the stead of the regulation or practice found unlawful, a regulation or practice which insures absolute equality to all shippers.

The order does not take private property in violation of the fifth amendment to the Constitution of the United States.

The order does no more than to require the carriers in making a system of car distribution to give every shipper an equal proportionate share of its facilities, without regard to the use of the coal, whether by the carrier or by the public. There is no taking of the property of the carrier in any sense of the term.

The appellees are engaged in the business of transportation as common carriers. All their property is charged with a public use, and in using their property they are bound not to discriminate between shippers. To remove a discrimination caused by the manner in which appellees use their property is not in any way a taking of their property in an unlawful manner. Under the order of the Commission the appellees are left with absolute freedom to contract for their fuel supply and may, if it becomes necessary for securing their fuel supply, take every available car, leaving shippers no equipment whatever. Under the order of the Commission, the carriers must go into the field and purchase their fuel supply on a basis of equality with other consumers of coal. The Constitution was never

intended to be used as a force whereby public-service corporations could use their power to prefer or to prejudice their customers, or to compel such customers to sell to the public-service corporations at less than a fair value for the articles sold. The carriers can, by the right of eminent domain, compel owners of coal to furnish that coal to the carriers, but the owners of coal have no power by which to compel the carriers to buy their coal. Justice and equity demand that so far as is possible the undue influence which carriers have exercised over coal operators should be removed. This justice and equity has been written into the public policy of the nation, and is evidenced by that provision of the act to regulate commerce which undertakes to divorce production and sale from the shipment of coal in competition with other producers and shippers along the lines of the common carriers.

By submitting this case for final decree upon bill and answer, appellees admit that they insist upon company fuel cars not being counted in order that they, appellees, may purchase their coal at a price lower than they would otherwise have been obliged to pay.

We do not find in the cases cited by appellees a single decision which in anywise controls the decision in this case, because the points in issue in those cases and the facts upon which the decisions were based are wholly different from the facts existing in this case.

There is no attempt in this case to manage the Illinois Central or the Chicago & Alton railroads. There

is no attempt to compel appellees to part with the use of their cars and give them to any other party. There is no attempt in any wise to take from the appellees a single lawful right. The only attempt is to compel them to do business as a common carrier without unduly preferring one shipper over another. There is no attempt here to prescribe a rule which has no connection with interstate commerce, as was the defect in the employers' liability case. The case of *I. C. C.* v. *Chicago Great Western R. R. Co.* (209 U. S., 106), cited by appellees, expressly holds that those who engage in transportation in interstate commerce as common carriers must do so subject to two leading prohibitions: 1. "That their charges shall not be unjust or unreasonable," and (2) "that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced."

CONCLUSION.

At the beginning of this argument we called attention to the rule which we understand governs in passing upon the validity of an act of an administrative tribunal such as we understand the Interstate Commerce Commission to be. If the statute confers jurisdiction upon the Commission to make the order complained of; if there was a complaint, an answer, a hearing, an investigation, a report and an order, and that order was duly served, then this court will not interfere because it, upon an original inquiry, might have arrived at a different conclusion. This court will examine the facts as they appear in this record, not for

the purpose of determining whether the original practice or regulation of the carrier was just and reasonable, but to determine whether the order or requirement of the Commission was within the limits of its powers and a reasonable exercise thereof. We have seen that no constitutional rights of the carrier are violated and that the statute has been complied with in every particular. If company fuel cars can be counted and the railroad company still enjoy every right as a common carrier to which it is entitled, then such cars must be treated as other cars and counted against the distributive share of the mine receiving them. If we apply this test, we find that the appellees can, first, use their own cars exclusively for their own fuel coal; second, use all their cars, if necessary, for their own fuel coal; third, buy their coal of whomsoever they please and at the best price they can secure.

The carrier can do all these things and still count the fuel cars. It follows, therefore, that there is no reason for restraining the enforcement of the Commission's order, based upon any deprivation of right of the appellees.

We therefore submit that the action of the court below was wrong and that the decree should be reversed with directions to dismiss the bill.

Respectfully submitted.

WADE H. ELLIS,
Assistant to the Attorney-General.
LUTHER M. WALTER,
Special Assistant to the Attorney-General.

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OCTOBER TERM, A. D. 1909.

OCT 11 1909
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States.

The Interstate Commerce Commission, Appellant,
vs.
The Chicago & Alton Railroad Company. } No. 232

The Interstate Commerce Commission, Appellant,
vs.
The Illinois Central Railroad Company. } No. 233

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY.

Filed Pursuant to Leave Granted February 23d, 1909.

FRANCIS I. GOWEN,
WAYNE MACVEAGH, McKENNEY & FLANNERY,
For Pennsylvania Railroad Company.

Allen, Lane & Scott, Prs., Phila.

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In the Supreme Court of the United States

The Interstate Commerce Commission, Appellant, vs. *The Chicago and Alton Railroad Company.*	October Term, 1908. No. 501.
The Interstate Commerce Commission, Appellant, vs. *The Illinois Central Railroad Company.*	October Term, 1908. No. 502.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY, FILED PURSUANT TO LEAVE GRANTED FEBRUARY 23d, 1909.

It will readily be admitted by all who have been called upon to consider the question from a practical standpoint that the problems which confront the Railway Manager when called upon to formulate a method or system of distributing coal cars

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in times of shortage of equipment, which shall do exact justice to all shippers, are of such a character as to make the task by no means an easy one.

After long consideration of the subject and after trial of other methods, the Pennsylvania Railroad Company on January 1st, 1906, put in force a system of allotting and distributing cars in times of shortage which, having regard at least to the conditions existing on its lines, it believes is as fair and just as can be devised.

The method then adopted and since acted upon was embodied in the following rule or regulation promulgated by it:

> "Commencing January 1st, 1906, assigned cars, *i. e.*, cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated."

The method of distribution provided for in this rule or regulation does not conform exactly, as we understand, to the practice pursued by the companies parties to the cases now pending

before the court, and is, to some extent, at variance with the order promulgated by the Interstate Commerce Commission in the proceedings in which the correctness of the method of distribution pursued by these companies was involved.

In view of the fact, therefore, that the method of distribution adopted and now enforced by the Pennsylvania Railroad Company is somewhat different from the methods which will probably be urged as correct by the parties to the pending cases, we shall confine what we have to say to an argument in support of the system of car distribution which the rule of that company provides for.

It will be observed that certain classes of cars are referred to in the rule as "assigned" cars, and that these are not regarded or treated, for reasons which are obvious, as subject to allotment generally. These assigned cars embrace three classes: (*a*) Cars which the Pennsylvania Railroad Company itself places at mines to be loaded with coal for its own fuel supply; (*b*) Cars of other railroad companies which are received by the Pennsylvania Railroad Company under special consignment to certain mines to be loaded with coal intended for the fuel supply of the companies owning the cars; (*c*) Cars belonging to the owners of mines located on the lines of the Pennsylvania Railroad Company, generally referred to as "individual" cars.

It requires but brief consideration to see why cars of these three classes are not subject to allotment. As to the fuel cars of the Pennsylvania Railroad Company, the cars must be placed of course at the mines from which the company is drawing its supply of coal, and unless the company is under obligation to apportion its purchases ratably among all the mines on its road, and this of course will not be contended for, it is obvious that the cars cannot be treated or regarded as allotable among shippers.

As to the fuel cars of other railroad companies, the Pennsylvania Railroad Company is necessarily controlled in the disposition of these cars by the consignment of them to the mines from which the Company owning the cars is drawing its supply of fuel, and hence these cannot be regarded as allotable cars.

As to the individual cars, the ownership of the same by a shipper necessarily controls and limits their use, and the Pennsylvania Railroad Company would be violating a property right of the owner of the car if it should undertake to make distribution of these cars among its shippers generally.

It follows, therefore, from these considerations that cars of the three classes referred to are properly "assigned" cars in the sense that they are not open to allotment generally, and hence that the Railroad Company is justified in the case

of its own fuel cars in placing these at mines from which it is drawing its supply of fuel, and is required in the case of the foreign fuel cars and the individual car to place these at mines to which they are consigned or to which they belong, in all instances without regard to the consideration whether the cars so placed at any mine do or do not exceed the number which would have been placed at it had it received only its share of the cars subject to allotment.

That cars of the three classes to which we have been referring are not to be regarded as subject to the rules controlling the allotment and disposition of cars which are subject to allotment has been recognized not only by the Interstate Commerce Commission, but by all courts which have been called upon to consider and deal with questions affecting car distribution. The order of the Interstate Commerce Commission entered in the proceedings against the Chicago & Alton Railroad Company and the Illinois Central Railroad Company, the validity of which is now before this court, clearly recognized this. That order reads as follows:—

> "It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce

a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; *but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it*, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; *that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be*

> *given full and exclusive use of them*, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars and so-called private cars."

The right and obligation of the carrier in respect to fuel and individual cars, as recognized and defined in the order of the Commission just quoted, have also been recognized and affirmed by all the courts which have had the subject under consideration. In no case has it been held or, indeed, so far as counsel is aware, has it even been contended that a railroad company has not full liberty of action as to placing its own fuel cars or that it was not under obligation to recognize consignments of foreign fuel cars and the right of the owner of the individual car to its exclusive use. And as it is not likely that any contrary view will be urged upon this court we have probably said more than was necessary or called for in support of the practice which the Pennsylvania Railroad Company, and doubtless all railroad companies, pursue in respect to the disposition of the so-called assigned cars.

There remains, however, for consideration the question whether in the distribution of the cars

subject to allotment any consideration or effect and if so, what, should be given to the fact that certain mines may have received either fuel or individual cars.

The cases pending before this court require, we understand, determination of this question in respect to the fuel cars of both classes and in respect to individual cars.

The courts which have heretofore had to consider the subject have differed as to the extent to which the allotment by a railroad company of its allotable cars should be affected or controlled by the consideration that fuel or individual cars have been placed at any of the mines on its lines. Some have held that the fact that fuel or individual cars had been so placed should be ignored in making distribution of the allotable cars while others have held that these cars must be taken into consideration in the ascertainment of the number of allotable cars to which the mines receiving the fuel or individual cars were entitled.

Undoubtedly strong reasons can be advanced in support of the proposition that the fuel and individual cars should be ignored, but the Pennsylvania Railroad Company, having regard to the conditions existing on its lines, came to the conclusion, after full consideration of the subject, that the fairest course to pursue was not to ignore the assigned cars which any mine owner had re-

ceived, nor on the other hand to treat them as if they were allotable cars in ascertaining the number of the latter which the mine owner was entitled to receive, but to charge the capacity of the assigned cars against the capacity of the mines at which they were placed, and in the distribution of its allotable cars to be governed by the reduced capacity of such mines in making allotment.

In other words, in determining the probable amount of coal which each mine owner on its road is desirous of shipping in its free or unassigned cars it is governed in the case of those mines which have received no assigned cars by the rated capacity of the mine, and in the case of mines which have received assigned cars by the rated capacity of the mine reduced to the extent of the capacity of the assigned cars placed thereat.

The method pursued by this company is opposed to the views of the Interstate Commerce Commission, that body holding that the assigned cars must be counted as allotable cars, and not merely in reduction of the mine's capacity, in determining the number of allotable cars to which mines receiving assigned cars are entitled, this view being embodied in the order made in the proceedings against the Chicago & Alton and Illinois Central Railroad companies above quoted.

The Circuit Court of the United States for the

Northern District of Illinois, which was called upon to enforce this order, upheld the Commission's view in so far as it related to the individual car and the foreign fuel car, but held that the fuel car of the railroad company making distribution should be taken into account only to the extent of reducing the rated capacity of the mine at which it was placed.

The other courts which have held that the cars must be counted have not indicated in what manner they should be.

As somewhat different considerations affect the question which we are considering as it relates to the three classes of cars, we shall deal separately with the issues involved as we conceive in a proper determination of the question as to how each class of cars should be counted.

(*a*) METHOD OF COUNTING CARS PLACED AT MINES TO BE LOADED WITH FUEL COAL FOR THE RAILROAD COMPANY MAKING THE ALLOTMENT AND DISTRIBUTION.

In dealing with this question we shall assume that the coal for which the fuel cars are placed is bought by the railroad company deliverable at the mine—this being probably the universal custom—and that the transportation consequently of the same thereafter is not for account of the owner of the mine but for the convenience of the

railroad company solely, and in order that the coal may be available at points at which it desires to use it.

Dealing then with the case which is presented where the transportation of the fuel car is for account of the railroad company and not for account of the mine owner, we submit that an injustice would be done the owner of the mine at which fuel cars are placed if these cars were to be treated as chargeable against the quota of cars which he was entitled to receive out of those which were subject to allotment among shippers.

Take the case of two mine owners each operating a mine capable of producing coal for the shipment of which 100 cars a day would be required. And let us suppose that during a certain season or period of time the railroad company on whose line the mines were located has available for the two operations only fifty cars. Each mine owner consequently receives twenty-five cars a day in which to make shipments. Let us further suppose that the railroad company makes a contract with one of the owners whereby he agrees to sell and deliver to it in its own cars at the mine fifty carloads of coal per day. It must be admitted, we think, that in making this purchase of coal and in subsequently moving it for its own account from the mine the railroad company has rendered to the mine owner from whom it has purchased the coal no service whatever as

a carrier, and yet if we are to adopt and be governed by the view that the fifty cars which the railroad company places at the mine to be loaded with its own fuel coal are to be counted as against the mine owner, the result would be that the fifty cars which it had available for the use of shippers would all go to the owner of the other mine and the owner of the mine who has sold the fuel coal to the railroad company would, because of this sale, have been deprived of the opportunity to ship any coal whatever on his own account.

No one will contend that the railroad company in purchasing this coal from one of the two mine owners did any injustice whatever to the other, and yet it is proposed that the mine owner selling the coal shall be penalized for making the sale by being deprived of the services of the railroad company as a carrier.

Unless we are to ignore facts and substitute fictions, it must be conceded that in the instance we have just put the mine owner who has made the sale of coal to the railroad company has been because of this consideration deprived of the opportunity of shipping any of his coal, notwithstanding the fact that he has still half the output of his mine available for shipment. Is not the better and fairer method to pursue that which the Pennsylvania Railroad Company follows in such a case, that is, to treat the mine owner from whom

it has purchased the fifty cars of coal as a would-be shipper to the extent of the capacity of his mine reduced to the extent of the capacity of the fuel cars placed? By following this method the fifty cars which we are assuming the Company has available for the two shippers would not be divided in the same manner as if neither of them were selling fuel coal, but the mine owner who had his entire output available for shipment would be treated as entitled to 100 cars and the other mine owner who was selling to the Railroad Company half the coal which his mine was capable of producing would be treated as a shipper to the extent of but 50 cars, and of the 50 cars of the Railroad Company available for shippers two-thirds consequently would go to the former and one-third to the latter.

In many instances fuel coal is loaded by the mine owner directly into the tenders of the engines at the mine and not into cars for movement elsewhere; and while it probably will not be contended that the delivery of such coal should reduce the operator's car supply, it is nevertheless a fact that every benefit which accrues to the operator who sells fuel coal accrues to the operator who delivers his coal into the tenders of the engines, and it would seem therefore logically to follow that in order to avoid any inequality in treatment the operator who delivers into the tenders should have

his supply of cars for shipment cut down notwithstanding the fact that he has not in making such delivery used a single car of the carrier.

But take the case of an operator who sells fuel coal with the knowledge that it is to be moved from his mine by the carrier. What service does the railroad company render him as a carrier in moving this coal? It does not transport the coal for his account or benefit. It does, it is true, furnish cars into which the coal will be loaded, but it does this merely to enable it to move the coal elsewhere for its own account and benefit, and the cars which will be thus used will be a part of those which are not available for shipments of operators.

Is it not true that the real objection of those who take issue with the method of dealing with the fuel cars provided for in the rule which we are considering is rested upon the fact that thereby coal operators from whom fuel coal is purchased are enabled, not to *ship* a greater proportion of the capacity of their mines than are other operators who do not so sell (because this they are not able to do) but are enabled to *mine* and *dispose* of a larger proportion?

But what right has a carrier to so allot and distribute its cars as to prevent the operator of one coal mine from mining and disposing of a larger proportion of his output than another operator? Would it not be justly said of any regulation having this in view that it was an intolerable interference with the business and rights of operators?

Take the case of two operators, one of whom is able, due to a local demand close to his mine, to market a portion of his product. Could it for a moment be contended that a railroad company would be justified in saying to this operator that in order to bring about equality between him and his fellow operator it would have to take into account the coal which he had thus disposed of in making apportionment of its cars and that he would have to be regarded as having received cars equal in capacity to the amount of the coal which he had sold?

Probably all will agree that in the case we have just put the right of the operator to receive his proportion of the carrier's cars, regardless of the consideration that he may have been able, by local sales, to market a portion of his output, is clear beyond the shadow of a doubt.

But how in principle does the case differ from that with which we are now concerned? Their similarity and, indeed, identity, in principle cannot be gainsaid, unless the fact that in the case under consideration the coal has been sold locally to the carrier itself, and has been moved by it from the mine, imports into the case a distinguishing factor.

But the fact that in one case the coal has been loaded into cars, while in the other it has not, really is immaterial when it is considered that the cars were not furnished in order that shipments might

be made therein, but solely for the purpose of enabling the carrier as a purchaser of the coal to transport it to points where it desired to use it.

The fallacy inherent in the argument advanced in support of the proposition that fuel cars must be regarded in the same light as if furnished for shipments by the operator from whom the coal is purchased by the carrier consists in this: that the movement of the fuel coal by the carrier is assumed to be transportation of the coal for the operator, when in point of fact it is nothing of the sort.

An operator selling coal to the carrier, deliverable at the mine, does not have a pound of such coal transported for his account, and what justification can there be for the application to such a transaction of a purely arbitrary theory, and one which is absolutely inconsistent with the facts, the effect of which would be to require the carrier to treat the transportation of the coal as made for account of the operator, contrary to the actual facts of the case, and this merely for the purpose of reducing the allotment of cars which such operator would otherwise be entitled to receive for his own shipments.

The coal, when delivered to the carrier at the mine, ceases to be the property of the operator. He derives absolutely no benefit from its transportation to a distant point. That transportation is for the exclusive benefit of the carrier and yet it is

argued that the facts of the case should be ignored, and the transportation should be arbitrarily treated as for the account and benefit of the operator, in order that thereby he may be prevented from making shipments of an equal amount of his own coal.

In all the instances which we have been considering the application of the method pursued by this company would, we submit, do exact justice. The coal sold locally or sold to the railroad company, whether delivered into cars or delivered into the tenders of the engines, is not ignored entirely, nor is it regarded or treated as having been shipped by the mine owner, but the extent or volume of coal which the mine owner is assumed to be able to ship is reduced to the extent of the volume of the coal thus otherwise disposed of, and the allotment of cars to such mine owner is based upon his consequently reduced demands as a shipper.

With the permission of the Interstate Commerce Commission a brief was filed on behalf of the Pennsylvania Railroad Company in one of the proceedings before the Commission which involved the question which we are now considering, and the views embodied in the present brief in respect to the correctness of the method pursued by the Pennsylvania Railroad Company in counting its own fuel cars were urged upon the Commission. The contentions advanced were thus disposed of by the Commission:

"The Pennsylvania Railroad Company, in its brief, does not discuss any decision of the courts or of this Commission concerning the matters in issue, but its whole argument is based upon a statement that the fuel coal sold by the operator to the carrier at the mine is carried thence by the carrier for its own benefit and not for the benefit of the operator. In other words, the operator in selling fuel coal to the carrier makes a purely local sale, the ultimate destination of the commodity thereafter being at the will of the carrier, and the mine operator not being a shipper at all with respect to the fuel coal delivered by him to the railroad.

"This argument is ingenious, but far from convincing. If it proves anything it proves too much. Commercial coal is usually sold f. o. b. at the mines, and the routing and freight charges thereon assumed by the purchasers. Would the Pennsylvania Railroad Company contend that the tonnage of such shipments should not be charged against the *pro rata* shares of car tonnage to which such mines are entitled? In both cases the available equipment of the carrier is used and the number of cars that can be furnished other shippers proportionately reduced.

"Again, the argument proves too much, for if followed to its logical conclusion it would result in the condemnation of the very rule in support of which it is offered. The rule of the Pennsylvania Railroad is that: 'The

> difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading' railroad fuel supply 'will be the rated capacity on which all other cars,' that is, for commercial shipments, 'will be prorated.'
>
> "But why make such computation at all? If the contention now made in the brief of the Pennsylvania Railroad Company be true, such reduction of the rated capacity of the fuel contract mines is unfair to them. The cars should be assigned arbitrarily and without deduction from the rated capacity of the mines. The mere statement of the result of the argument refutes it. The fact of the matter is, however, that the occupation, the user, and the consequent reduction of the available equipment of the road is the vital matter in all cases of car distribution in times of shortage, and whether the cars are used for fuel supply or for commercial shipments they should be furnished the mines as hereinbefore set forth."

It will require, we think, but brief consideration to demonstrate that the criticism made by the Commission is not well founded.

Take the case which is put by the Commission of a delivery of cars to a purchaser of coal f. o. b. the mine. The question is asked whether it would be contended that the tonnage shipped by such purchaser should not be charged against the *pro rata* share of cars to which the mine operator was

entitled, and it would seem to have been the view of the Commission in putting this question that if the cars delivered to such purchaser would be counted against the operator, then it necessarily follows that the fuel cars delivered at the mine should also be counted as against the quota of cars which the operator of the mine was entitled to receive.

Waiving the objection that the cases are not similar because of the fact that in the case of the coal transported for the purchaser f. o. b. the mine the carrier is performing a service as carrier, while in the case of the fuel car it is performing no service as a carrier, either in the placing or subsequent movement of the car, and treating the analogy between the two cases as complete, we submit that the effect upon the number of cars which the operator should receive in the case put by the Commission would be precisely the same as we claim should result from the delivery of fuel cars at a mine.

Take the case of an operator who sells f. o. b. the mine 25% of his output. The purchaser of this coal is unquestionably entitled to demand and receive from the railroad company on whose line the mine is located, cars for its shipment, and the operator is equally entitled to receive cars for that portion of the output which he has not sold, and we submit that it would be utterly inadmissible for the carrier in the case we are considering to

treat or count any of the cars delivered to the purchaser as forming any part of those to which the operator of the mine was entitled. All that the carrier could or should do would be to give to the purchaser his proper percentage of cars based upon the amount of coal he had for shipment and to treat the capacity of the operator's mine as reduced to the extent of the coal which he had sold, and which was to be shipped from the mine for account of the purchaser, and this is the precise result that follows the purchase of fuel coal from any operator.

Again, it would appear that the Commission considered that the logical result of the argument advanced upon the part of the Pennsylvania Railroad Company was that the fuel cars should not be counted at all, and that some inconsistency was involved in the method of counting them in the manner that the company's method provides for.

But there is no real basis for this criticism. The method of counting the fuel cars pursued by the Pennsylvania Railroad Company presupposes that the object of the carrier should always be to so apportion its distributable or allotable cars as to give to every intending shipper cars which will enable him to ship the same proportion of the coal which he had available for shipment as every other operator will be able to ship with the cars placed at his disposal.

It therefore, in the case of an operator furnishing fuel coal, treats him as a shipper of the difference between the rated capacity of his mine and that portion of its output which he has sold as fuel coal, and it is difficult to see where the inconsistency comes in to which the Commission refers.

May it not be fairly said that the weakness of the criticism goes far to sustain the correctness of the method criticised.

Method of Counting Fuel Cars of Other Railroads.

The coal which is transported in these cars is, as a rule, transported for account of the foreign railroad company, for, with rare exceptions, the coal is purchased deliverable at the mine. The vehicle of transportation is not only, therefore, the property of the foreign railroad company, but the transportation is for the account of that company, and as the disposition of the car is not within the control of the railroad company which places it at the mine to which it is consigned, it is difficult to see what service as a carrier the railroad company placing the car renders to the mine owner receiving it, and what we have already said, therefore, in respect to the fuel car of the railroad company making distribution of the cars would seem to apply equally as well to the case we are now considering.

But the Circuit Court for the Northern District of Illinois in the cases pending before this court held that a different rule must pertain as to the two classes of fuel cars, because, as the court put it, the railroad company making distribution "must count them (*i. e.*, the foreign fuel cars) as part of their own available commercial equipment." And such seems to be the view entertained by the Interstate Commerce Commission.

It will doubtless be admitted that they ought not to be treated and counted as part of the "available commercial equipment" of the railroad company making distribution unless, as a matter of fact, they are equipment of that character, and we submit that they cannot be so regarded.

Waiving the question whether the railroad company to which these cars are delivered under special consignment to certain mines would be justified in refusing to accept them, is it not clear that if it does accept them it thereby obligates itself to make delivery of the same at the mines to which they are consigned. How then can they be treated as cars available for commercial shipments?

The view that these foreign fuel cars become part of the available commercial equipment of the railroad company receiving them is, we submit, totally at variance with the conclusion which all tribunals which have had to consider the subject

have come to, that the railroad company which receives these cars is bound to deliver them at the mines to which consigned, even though by doing so it may place on any given day at the mines receiving them a larger proportion of cars than the other mines on its road will receive. If these foreign fuel cars are to be regarded as available commercial equipment of the railroad company which receives them, then it would seem inevitably to follow that the consignment of them must be disregarded, when compliance therewith would lead to inequality of distribution.

What justification can there be for treating these cars as a part of the available equipment of the railroad company to which they are delivered, when, as a matter of fact, they are nothing of the sort. They are not available for distribution, for they have been delivered to and accepted by the railroad company which receives them merely for the purpose of being transported to a certain mine or mines and there delivered, and they have not come into the possession or control of the railroad company under circumstances or conditions which make them available generally for shippers on its line. It is, we submit, a clear perversion of the whole situation to treat these cars over which the railroad company is not at liberty to exercise any power of disposition as in the same category as its own cars over which its control and power of disposition are complete.

There being, therefore, no just basis for the view upon which the Circuit Court rested its conclusion in respect to these foreign fuel cars we respectfully submit that the conclusion itself is erroneous and should not be sustained.

Dealing then with the question apart from the reasoning upon which the Circuit Court for the Northern District of Illinois acted, what is the proper view to be taken of the right of a shipper who has received foreign fuel cars to demand and receive from the railroad company which is under obligation to furnish him equipment, his fair share of whatever cars it has available.

The duty resting upon a railroad company is to make an equal allotment of its cars among all shippers on its line desirous of using them. Why should it be relieved of this obligation as to one shipper who procures from another railroad company cars for the shipment of part of his product? What reason can be advanced in support of the argument that such an act on the shipper's part properly operates to deprive him of his share of the cars of the railroad company which is under obligation to furnish him cars? But it may be said that if the shipper receiving the foreign fuel car is permitted to receive also his share of the cars distributed by the railroad company on whose road his mine is located, he will be thereby enabled to ship and dispose of a larger proportion of the

output of his mine than will the other shippers who have not been able to secure any foreign fuel cars. We submit, however, that it is no part of the carrier's duty to regulate the amount of coal which any one of its operators shall ship. Its duty is to make allotment of its available cars in such manner as to give to each of its shippers an equal percentage or *pro rata* of the cars which it has for distribution, and this obligation, we contend, it is bound to observe regardless of the fact that one or more shippers may be able to secure, in addition, cars from other sources.

The Interstate Commerce Commission has, we think, recognized the difficulties which confront those who contend that it is a railroad company's duty to count the foreign railroad car, and also the individual car, as if it were a part of the railroad company's own equipment. In the order made in the proceeding brought by the Rail & River Coal Company against the Baltimore & Ohio Railroad Company, the validity of which this court is now called upon to determine, the Commission says:

> "The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their owners,

and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating. And that principle must control the defendant's course in the future with respect to such cars. It may be well, however, at this time to say for the general information of those interested in such matters that in this proceeding, as well as in other proceedings that have come before the Commission, too little stress has been laid upon the very obvious relation between a shortage in cars and an insufficiency in motive power, in sidings, in tracks, in train crews, and other facilities necessary to the movement of traffic. A shortage of cars on a particular line does not mean that the supply of cars of that carrier has been diminished in number, but only that the volume of traffic offered exceeds the capacity of its available equipment to move it. A shortage in cars usually, if not invariably, is accompanied by a shortage in some one or more of the other facilities of the carrier. When it has not enough coal cars, it

usually has not enough locomotives and other facilities to meet the demands of its coal shippers. That was the case in the *Hocking Valley case*, *supra*, and in this record sufficient testimony of that tenor appears to lend support to the disposition here made of that portion of the complaint. But this element in a shortage situation must not be overlooked by litigants who complain of the methods of carriers in the distribution of their equipment. Its importance is very clear. The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. When any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the Commission has said on those questions in its formal decisions."

Now whatever may be the proper rule to be pursued in cases where the car shortage results from the conditions to which the Commission refers, we submit that the considerations alluded to by the Commission as tending to support the view reached by it should have no weight in the determination of the question what the proper distribution of cars should be where the shortage arises not from insufficiency of motive power nor from inadequacy of terminals, but solely and entirely from a deficiency in the number of available cars. It may be true that in many instances the shortage of cars is caused by other conditions than an insufficiency of car equipment, but it is equally true that in many instances the deficiency is the result merely of an inadequate car supply.

But even in cases where the car shortage is the result of a combination of causes among which are inadequacy of motive power, is it proper that in making distribution of its coal cars a railroad company should be governed by the consideration that if it makes an equal *pro rata* allotment of its own cars one or more of its shippers may thereby be enabled to secure the benefit of a larger proportion or share of its motive power than the others. Is not this a rather far-fetched and unsubstantial consideration?

If there is anything at all in it, the wrong, if there be one, should not be remedied or corrected

by requiring the railroad company to perpetrate another wrong, that is to withhold from any shipper his fair percentage, having regard to the volume of his shipments, of the cars which it has for distribution. By doing this the result might be that the shipper would secure only his equal *pro rata* share of the transportation which the railroad company was furnishing, but he would, without question, be deprived of his fair share of the cars which the company had for distribution.

If the delivery of the foreign fuel car at the mine to which it is consigned would have the effect of reducing the number of cars which any other operator or shipper would otherwise have received, there might be some plausible ground upon which to rest an argument in support of the contention that the railroad company was under an obligation to so adjust its system of distribution as to neutralize the injury to shippers which would otherwise follow its acceptance and delivery of these fuel cars. But no such result can follow. On the contrary, under the system which this company has in force the larger the number of foreign fuel cars received, the larger will be the number of the cars which the railroad company will have for allotment at mines not receiving the fuel cars. This result will follow because every mine receiving the fuel cars will have its capacity reduced to the extent of the capacity of the fuel cars with

a consequent reduction in the percentage of the cars which it will receive from the railroad company and a consequent increase of the percentages of all the other mines.

The railroad company's interests are of course subserved by the receipt from other railroad companies of cars in times of car shortage, and as we have endeavored to show, the interests of shippers are not detrimentally affected, but, on the contrary, are advantageously affected, whether they be shippers using the cars or shippers who do not receive any of them. There would therefore seem to be no real justification for trying to invent some fiction of law which would enable the railroad company to treat the foreign fuel car as part of its equipment in order to deprive shippers on its line of the proportion of its own equipment which they would have received had they not received some foreign fuel cars.

Method of Counting Individual Cars.

Much criticism has been directed against the individual or private cars, unjustly, we think, but a discussion of the points involved in a proper determination of the question whether cars of this character are or are not objectionable is out of place here. Congress in legislating concerning interstate transportation has not seen fit to prohibit their use or transportation, and, indeed, by the Hepburn Act, has expressly conferred upon the

Interstate Commerce Commission the power to determine the reasonableness of the payments to be made by a carrier to the owner of these cars for their use. By Section 15 of the Hepburn Act it is provided that

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, *or furnishes any instrumentality used therein*, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered *or for the use of the instrumentality so furnished*, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

In addition to the sanction thus inferentially given by the enactment of Congress to which we have just referred to the use and transportation of the individual or private car, the charter of the Pennsylvania Railroad Company—and doubtless many of the charters of the older railroad companies in the country contain similar provisions—imposes the duty upon the company of receiving and transporting the individual or private cars of shippers.

Section 21 of the Act of the State of Pennsylvania of April 13th, 1846, the Act incorporating the Pennsylvania Railroad Company, provides as follows:—

> "Upon the completion of the said railroad, or any part thereof, the same shall be esteemed a public highway, for the conveyance of passengers and the transportation of freight, subject to such rules and regulations in relation to the same, and to the size and construction of wheels, cars, and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct: *Provided*, That the said company shall have the exclusive control of the motive power, and may from time to time establish, demand, and receive, such rates of toll or other compensation, for the use of the said road, and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles containing the same, or otherwise passing over or on said railroad, as to the president and directors shall seem reasonable."

In Boyle *vs.* Philadelphia & Reading Railway Company, 54 Penna. State Reports, 310, in construing the charter of the Philadelphia & Reading R. R. Co., which, in respect to the feature which was involved in the decision of the case, was similar in effect to the charter of the Pennsylvania

Railroad Company, the Supreme Court of Pennsylvania said:—

> "From these provisions of the Acts of Assembly, it is plain that the company was incorporated both as a railroad and a transportation company. As a railroad company they had power to construct and maintain a railroad from Philadelphia to Pottsville and to charge and receive tolls from those who might transport either merchandise or passengers over it. As a transportation company, authority was given them to transport either passengers or the property of others over their own road, in their own cars and with their own motive power. Both these agencies for transportation, that of the company and that of others using the roadway of the company to transport for themselves, were evidently in the mind of the legislature. That it was contemplated others besides the company might use the road after its completion, and might transport upon it their own property as well as passengers, might put cars and carriages upon the road, is beyond question. If not, the entire twentieth section of the original act, the Act of 1833, is unmeaning and even absurd. The road was to be a public highway, as truly such as is a canal or a turn-pike road, though it was placed under the care, management and regulation of its owners."

Under the decision to which we have just alluded, the railroad company is required to serve

the public and shippers in a dual capacity. As a "railroad company," using the term in the sense in which the court used it in the case just referred to, it is obliged to receive and transport all the cars which shippers may tender to it, and as a transportation company it is required to furnish the cars, when demanded, as well as the transportation.

The argument, therefore, in favor of the method of counting the individual car which this company has adopted is really stronger than that in support of the method of counting the foreign fuel car. All the considerations to which we have referred in dealing with the foreign fuel car are equally applicable to the case of the individual car. We shall not, of course, attempt to re-state these, but shall ask the court to apply what we have said on the subject of foreign fuel cars to the case of the individual car.

But the owner of the individual car in use on the lines of the Pennsylvania Railroad Company has this further argument in his favor. Under the section of the charter of the company to which reference has already been made it is clear that any shipper has a right to the services of the company both as a "railroad" and a "transportation" company, again using these terms in the sense in which the Supreme Court of Pennsylvania used them in the case referred to.

Having then the right to have his own cars transported, can it possibly be claimed that by exercising this right he thereby deprives himself to any extent of the services of the company as a transportation company?

He has a right to require the railroad company to move his own cars, and he has a further right to his full share of the services which the company, as a transportation company, is in a position to render him, and, having this right, it is, we submit, impossible to formulate an argument to sustain the right of a company, charged with the performance of a double duty of the character to which we are referring, to decline to render to the shipper the full measure of service to which he is entitled, because of the fact that if it does so it will be performing for him a larger or greater service than it will perform for other shippers, when this condition results, because these other shippers are not desirous of utilizing the services of the company both as a "railroad" and as a "transportation" company.

But, leaving this feature of the case, and dealing with the question of the individual car disassociated and apart from any obligation in respect to its transportation which may be imposed by legislation, is there any reason why a railroad company which moves or transports private cars for any shipper should in the distribution of its own cars

treat the individual car as if it were one which it itself had supplied to the shipper?

We start with the fact, which must be admitted, that the railroad company has not furnished the shipper with this car. The car was acquired by the shipper and is his private property, and the railroad company is bound to recognize his right to the car, and is consequently bound to confine its use to the shipper.

The car was neither received by the shipper nor delivered by the railroad company under or pursuant to any system of distribution of cars which were subject to allotment, and if it is to be treated as between the shipper and the railroad company as an allotable car, some reason will have to be found for treating it as a substitute for an allotable car, for it is clearly not permissible, unless we are to pervert or ignore all the facts of the case, to treat it as a car of this character.

Prima facie, there seems to be nothing unreasonable in allowing a shipper to supplement the cars which the carrier may be able to deliver to him with additional ones which he may purchase or acquire for himself.

But it is said that if this be done the mine owner who has purchased or secured individual cars is able to ship a larger portion of his output than other owners who have no private cars. But if

this results from the purchase or acquisition by the mine owner of cars for his own use, what ground is there for holding that the railroad company is guilty of discrimination unless it takes measures to prevent the owner from shipping any more coal than he would have shipped had he not secured the private cars.

The purchase and use of these cars has not operated to the detriment of any other shipper, but, on the contrary, as in the case of the foreign fuel cars, their use has increased the number of cars which the other shippers will receive from the railroad company. What greater justification is there then for action by the railroad company intended to reduce the shipment of the operator owning the private cars than there would be for action by it designed to neutralize the advantage which any mine owner might secure who made an expenditure for the purpose of increasing the output capacity of his mine or the length of the siding on which cars were placed at his mine for loading or indeed any other outlay the purpose of which was to increase the volume of his shipments?

The duty of the railroad company goes no further than to require it to refrain from giving to any shipper an undue share of its transportation facilities. If a shipper by his own outlay has put himself in a position to avail himself to a greater extent than his neighbor of the transportation

facilities of the railroad company, it does not become the duty of the railroad company to prevent such shipper from availing himself of the benefits which accrue from his outlay. It follows, therefore, logically, we submit, that a railroad company which is engaged in transporting private cars of a shipper is neither justified nor warranted in so reducing the number of its own cars which it delivers to the shipper as to deprive him of any benefit which would otherwise accrue to him from the ownership of these cars.

If the transportation of the private car is to be at all considered in determining the number of the company's cars which the owner of the private car should receive, it should have no greater effect than is accorded under the system which the Pennsylvania Railroad Company has in force.

Under it regard is paid to the private car owner's right to have his cars transported, and the fact that they are so transported is not made use of in order to deprive him of his right to his quota of allotable cars, but in determining to what extent he should be regarded as a would-be shipper in allotable cars, the capacity of his mine is not taken as the test or basis, but this capacity is reduced to the extent of the shipments made in his own private cars, and the percentage of allotable cars to which he is entitled is ascertained with reference to such reduced capacity.

It should always be borne in mind in dealing with questions affecting car distribution that the real parties in interest are the shippers. It is immaterial to the carrier what proportion of its equipment any one shipper receives, provided, of course, it is not in excess of his requirements and of his consequent ability to utilize. The shippers are the real parties whose interests are at stake in the matter. The method of distribution which the Pennsylvania Railroad Company enforces is based upon the theory that it is neither its duty nor its right to deprive shippers of any benefit which they can derive from the use of cars for their shipments, which they may be able to procure either by arrangement with another railroad company or by purchase.

Those who criticise this system of distribution are necessarily forced to hold that it is not only the right but the duty of a railroad company to withhold cars from shippers whenever it is necessary to do so in order to prevent any one or more from shipping a greater percentage of the coal which he had available for shipment than his fellow-shippers.

Believing that no such obligation rests upon a railroad company, but that its duty so far as its own cars are concerned is to make a ratably equal distribution of the same, and to transport in addition cars tendered to it by shippers which

they either own or have secured the right to use, the Pennsylvania Railroad Company put in effect its present system of distribution which in its judgment best meets the requirements of the situation.

FRANCIS I. GOWEN,
WAYNE MacVEAGH, McKENNEY & FLANNERY,
For Pennsylvania Railroad Company.

Office Supreme Court, U. S.
FILED.
FEB 8 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*	No. 232.
INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*	No. 233.

BRIEF

ON BEHALF OF HORACE LOWRY, C. E. WALES AND J. L. D. SPEER, AS RECEIVERS OF THE ILLINOIS COLLIERIES COMPANY.

ELDON J. CASSODAY,
RUSH C. BUTLER,
Solicitors for said Receivers.

CASSODAY & BUTLER,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant*, vs. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee*.	No. 501.
INTERSTATE COMMERCE COMMISSION, *Appellant*, vs. ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee*.	No. 502.

BRIEF ON BEHALF OF HORACE LOWRY, C. E. WALES AND J. L. D. SPEER, AS RECEIVERS OF THE ILLINOIS COLLIERIES COMPANY.

On October 31, 1907, the Illinois Collieries Company filed its separate complaints before the Interstate Commerce Commission against the Chicago & Alton Railroad Company and Illinois Central Railroad Company, respectively, complaining that these companies were unjustly discriminating in their method of distribution of coal cars among the several coal mines along their lines of railroad. Afterwards Glenn W.

Traer was appointed as receiver of the Illinois Collieries Company by the Circuit Court of Sangamon County, Illinois, and was substituted as complainant in each of said cases. A hearing was had and the Commission entered an order in each case requiring said companies to desist from their then method of distribution by which they failed to count against the mine receiving them, foreign railway cars, private cars and cars sent to such mines for the company's own fuel supply and ordering and directing each of said companies to count said cars against the mines receiving them after the first day of July, 1908. The opinion of the Commission is found in *Traer, Receiver,* v. *C. & A. R. R. Co. et al.,* 13 I. C. C. Rep., 451, and in the Transcript of Record in the Alton case (No. 501) on pages 28 to 35, inclusive, and in the Illinois Central case (No. 502) at pages 36 to 43, inclusive. The order of the Commission is found in the Transcript of Record in the Alton case at pages 36 and 37 and in the Illinois Central case on pages 43 to 45, inclusive.

On June 1, 1908, each of said companies filed a bill for an injunction against the Interstate Commerce Commission in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in and by which it sought among other things to enjoin the Commission from enforcing said order. The cases were heard together on bill and answer by Circuit Judges Grosscup, Baker and Kohlsaat, and a decree was entered enjoining the interstate Commerce Commission from enforcing that part of its order requiring the railroad companies to count cars used for their own fuel supply against the mine or mines receiving them, and denying an injunction against that part

of the order requiring the counting of the foreign railway fuel and private cars.

From that order the Interstate Commerce Commission prosecuted this appeal. Afterwards Glenn W. Traer resigned as such receiver, such resignation becoming effective December 1, 1908, and your petitioners, were by order of said Circuit Court of Sangamon County, Illinois, appointed as receivers of said Illinois Collieries Company, and qualified and entered upon the duties of their office on said date, since which time they have been and still are acting as such receivers. On their motion this Court granted them leave to file a brief herein.

There was not and, as we understand it, is not now any controversy as to the correctness of the order of the Commission or of the decree of the Circuit Court so far as private and foreign railway cars are concerned, and we shall therefore consider those questions as settled by the decree and as not in issue here.

It is not our purpose to call any more fully to the attention of the court the history of these proceedings or to attempt at this time to state in detail the issues made by the pleadings, as these matters have been fully stated and presented in the other briefs filed. We shall, therefore, address ourselves immediately to what we conceive to be the principal question before the court, which is: Does the practice of the railroad company in failing and refusing to count against the mines receiving them cars sent to such mines for the railroad company's own fuel supply unjustly discriminate in favor of such mines and against others not receiving such cars?

POINTS AND AUTHORITIES.

First. The method of distribution of cars to be used in interstate commerce is within the provisions of the act to regulate commerce and within the jurisdiction of the Interstate Commerce Commission.

Sections 1 and 3 of Act to Regulate Commerce.

U. S. ex rel. Pitcairn Coal Co. v. *B. & O. R. R. Co.*, 154 Fed. Rep., 108.

B. & O. R. R. Co. v. *U. S. ex rel. Pitcairn Coal Co.* (C. C. A., 4th Circuit).

*Logan Coal Co*v. *Penn. R. Co.*, 154 Fed. Rep., 497.

U. S. ex rel. v. *N. & W. Ry. Co.*, 143 Fed. Rep., 266; 74 C. C. A., 404.

U. S. ex rel. Kingwood Coal Co. v. *W. Va. N. Ry. Co.*, 125 Fed. Rep., 252.

W. Va. N. R. Co. v. *U. S. ex rel. Kingwood Coal Co.*, 134 Fed. Rep., 198, 204; 67 C. C. A., 220.

U. S. v. *Oregon R. & N. Co.*, 159 Fed. Rep., 975.

Majestic Coal & Coke Co. v. *Ill. Cent. R. R. Co.*, 162 Fed. Rep., 810.

Railroad Commission of Ohio v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, 404.

Traer, Receiver, v. *C. & A. R. R. Co. et al.*, 13 I. C. C. Rep., 451.

Royal Coal & Coke Co. v. *Southern Ry. Co.*, 13 I. C. C. Rep., 440.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. Rep., 86.

Second. The practice of the appellees, and each of them, in failing and refusing to charge against the percentage or distributive number of cars to which certain mines would be entitled, cars sent to said mines to be loaded with appellees' own fuel supply, is an unjust discrimination against the other coal mines on said lines of railroad and is a violation of the provisions of the act to regulate commerce.

Section 3 of Interstate Commerce Act.

The railroad company and a shipper do not stand on a footing of equality.

N. Y. C. R. R. Co. v. *Lockwood,* 17 Wall., 357.

The right to use such cars is a matter separate and distinct from and not in any way dependent upon or affected by the counting or failure to count such cars.

Traer, Receiver, v. *C. & A. R. R. Co.,* 13 I. C. C. Rep., 457.

(a) THE APPELLEES USE THEIR PRACTICE OF NOT COUNTING SUCH CARS AS A SCHEME OR DEVICE TO GIVE AN ADVANTAGE TO THE MINE OWNER FROM WHOM THEY BUY THEIR FUEL, SO AS TO INFLUENCE AND GOVERN THE PRICE OF SUCH FUEL.

Report of Interstate Commerce Commission to Congress, January 25, 1907.

The railroad companies cannot justify their practice of not counting such cars on the ground that, without it, they would be compelled to pay a higher price for their coal.

N. Y., N. H. & H. R. R. Co. v. *Interstate Commerce Commission,* 200 U. S., 361, 399.

Covington & Lexington Turnpike Road Co. v. *Sanford*, 164 U. S., 578, 596.
Union Pac. R. Co. v. *Goodridge*, 149 U. S., 680.
Smyth v. *Ames*, 169 U. S., 466.

The rule or practice of counting or not counting cars has been before the court and the Commission in a number of cases.

Logan Coal Co. v. *Penn. R. Co.*, 154 Fed. Rep., 497, 503.
U. S. ex rel. Pitcairn Coal Co. v. *B. & O. R. R. Co.*, 154 Fed. Rep., 108; reversed in *B. & O. R. R. Co.* v. *U. S. ex rel. Pitcairn Coal Co.*, C. C. A., 4th Circuit.
Majestic Coal & Coke Co. v. *Illinois Central R. Co.*, 162 Fed. Rep., 810.
U. S. ex rel. Coffman v. *N. & W. R. Co.*, 109 Fed. Rep., 831.
Railroad Commission of Ohio v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398.
Traer, Receiver, v. *C. & A. R. R. Co.*, 13 I. C. C. Rep., 451.
Royal Coal & Coke Co. v. *Southern Ry. Co.*, 13 I. C. C. Rep., 440.
Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. Rep., 86.

(b) THE CONTRACT AND NON-CONTRACT MINES ARE SIMILARLY SITUATED.

Logan Coal Co. v. *Pennsylvania R. Co.*, 154 Fed. Rep., 497.
Majestic Coal & Coke Co. v. *Illinois Central R. R. Co.*, 162 Fed. Rep., 810.

(c) SUCH PRACTICE IS ONLY OPERATIVE DURING TIMES OF CAR SHORTAGE AND BY IT THE RAILROAD COMPANY IS ENABLED BY REASON OF ITS FAILURE TO FURNISH ADEQUATE EQUIPMENT TO OBTAIN A REDUCTION IN PRICES AND TO GIVE TO ITS CONTRACT MINES AN UNDUE ADVANTAGE OVER NON-CONTRACT MINES.

(d) SUCH CARS EVEN WHEN IN USE BY THE RAILROAD COMPANY IN TRANSPORTING ITS OWN FUEL ARE STILL A PART OF THE EQUIPMENT OF THE ROAD AND WITHIN THE TERMS OF THE INTERSTATE COMMERCE ACT.

The cars are engaged in a public use for the benefit of the public and not alone of the railroad company.

The hauling of the railroad's own fuel coal constitutes a "carriage."

Section 1 Interstate Commerce Act.

Such cars are used to obtain coal with which to operate engines and trains which are engaged in interstate commerce and are therefore an indispensable and necessary part of interstate commerce itself.

Johnson v. *Southern Pacific Ry. Co.*, 196 U. S., 1.

(e) EVEN THOUGH SUCH CARS WHEN TRANSPORTING THE RAILROAD'S FUEL MAY NOT THEMSELVES BE ENGAGED IN COMMERCE, STRICTLY SPEAKING, THE FAILURE TO COUNT THEM DIRECTLY AFFECTS THE DISTRIBUTION OF THE REMAINING CARS WHICH ARE ENGAGED IN INTERSTATE COMMERCE.

Galveston, Harrisburg & San Antonio Ry. Co. v. *Texas*, 210 U. S., 217.

Loewe v. *Lawlor*, 208 U. S., 274.
Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S., 211.
In re Debs, 158 U. S., 564.
Atlantic Coast Line v. *Wharton*, 207 U. S., 328.
Employers' Liability Cases, 207 U. S., 463.
Northern Securities Co. v. *U. S.*, 193 U. S., 197.
Asbell v. *Kansas*, 209 U. S., 251.
U. S. v. *Wells, Fargo Express Co.*, 161 Fed. Rep., 606.
Interstate Commerce Commission v. *Baird*, 194 U. S., 25.
Swift & Co. v. *U. S.*, 196 U. S., 375.
Montague v. *Lowry*, 193 U. S., 38.

A comparison of the practice of the railroad companies, the plan proposed by the Honorable Circuit Judge and the practice provided for in the order of the Commission, shows unjust discrimination in the two former methods.

Illinois Central R. Co. v. *Interstate Commerce Commission* (Transcript No. 501, page 52, No. 502, page 60).
Traer, Receiver, v. *C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, 455, 457.

The practice of the railroad companies has a direct and immediate effect upon the distribution of cars engaged in interstate commerce and is an unjust discrimination in violation of the Act to Regulate Commerce.

Majestic Coal & Coke v. *Illinois Central R. Co.*, 162 Fed. Rep., 810.
N. Y., N. H. & H. R. Co. v. *Interstate Commerce Commission*, 200 U. S., 361.

ARGUMENT.

First. The method of distribution of cars to be used in interstate commerce is within the provisions of the act to regulate commerce and within the jurisdiction of the Interstate Commerce Commission.

This is clearly shown by the provisions of the Act to Regulate Commerce.

Section 1 of the Act defines the term *"transportation"* as follows:

> "The term 'transportation' shall include *cars and other vehicles and all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

Section 3 of the act makes it unlawful to give any undue preference or advantage in any respect whatsoever.

It has been held in many cases that the method of distribution of cars was within the provisions of the Interstate Commerce Act.

U. S. ex rel. Pitcairn Coal Co. v. *B. & O. R. R. Co.*, 154 Fed. Rep., 108.

B. & O. R. R. Co. v. *U. S. ex rel. Pitcairn Coal Co.*, (C. C. A. 4th Circuit).

Logan Coal Co. v. *Penn. R. Co.*, 154 Fed. Rep., 497.

U. S. ex rel. v. *N. & W. Ry. Co.*, 143 Fed. Rep., 266; 74 C. C. A., 404.

U. S. ex rel. Kingwood Coal Co. v. *West Virginia Northern R. Co.*, 125 Fed. Rep., 252.

W. Va. Northern R. Co. v. *U. S. ex rel. Kingwood Coal Co.*, 134 Fed. Rep., 198, 204; 67 C. C. A., 220.

U. S. v. *Oregon R. & N. Co.*, 159 Fed. Rep., 975.

Majestic Coal & Coke Co. v. *Ill. Cent. R. R. Co.*, 162 Fed. Rep., 810.

In *Logan Coal Co.* v. *Penn. R. Co.*, 154 Fed. Rep., 497, 500, HOLLAND, District Judge, said:

> "It is clear that the third section of the Commerce Act prohibits any unlawful or undue and unreasonable discrimination against shippers along the line of a railway company engaged in interstate commerce, *in the distribution of cars* or in the performance of any other of its duties as a common carrier which the public has a right to require of it."

The Interstate Commerce Commission has also held that it had jurisdiction over this subject.

Railroad Commission of Ohio v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, 404.

Traer, Receiver, v. *C. & A. R. R. Co. et al.*, 13 I. C. C. Rep., 451.

Royal Coal & Coke Co. v. *Southern Ry. Co.*, 13 I. C. C. Rep., 440.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. Rep., 86.

Second. The practice of the appellees, and each of them, in failing and refusing to charge against the percentage or distributive number of cars to which certain mines would be entitled, cars sent to said mines

to be loaded with appellees' own fuel supply, is an unjust discrimination against the other coal mines on said lines of railroad and is a violation of the provisions of the act to regulate commerce.

Section 3 of the Act to Regulate Commerce provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this act *to make or give any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, or locality, or any particular description of traffic, *in any respect whatsoever,* or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, *to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*"

If, therefore, the practice of not counting the company fuel cars against the contract mines (meaning thereby mines having contracts with a railroad company for its own fuel coal), gives "any undue or unreasonable preference or advantage" to such mines "*in any respect whatsoever,*" or if such practice subjects the non-contract mines "*to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,*" then it is clear that such practice is a violation of the above section of the Interstate Commerce Act and that the order of the Commission that the railroad companies should desist from such practice and should in the future count such cars against the contract mines was a proper and a valid one and the decree of the Circuit Court enjoining the enforcement of that part of said order was erroneous and should be reversed.

Let us examine for a moment into this practice of

the railroad company to note its effect. This is clearly shown by the answers of the Interstate Commerce Commission, which allege:

> "Defendant avers that the allotment by complainant of said * * * complainant's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by complainant and the failure by complainant to count and charge said * * * company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to-wit:
>
> (a) That the operator receiving the * * * company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.
>
> (b) That the operator receiving * * * the company fuel cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.
>
> (c) That the operator receiving the * * * company fuel cars, is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future re-ratings of such mine by complainant for the purposes of car distribution the mine would receive a higher rating and consequently a larger number of cars in complainant's general distribution of cars.
>
> (d) That the operator receiving * * * company fuel cars, is enabled thereby to secure and hold a larger, more efficient and regular working force of miners and laborers.
>
> (e) That the development of the mines which

do not receive the * * * company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accelerated.

(f) That by the arbitrary allotment of the * * * company fuel cars, the complainant * * * are enabled to secure low prices on railway fuel because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(g) That the operator of the mine receiving the * * * company fuel cars is thereby enabled to make contracts for the delivery of coal distributed over a long period, to an extent that the operator of the mines which do not receive such cars can not do." (Transcript No. 501, pages 20, 21; No. 502, page 31.)

The answers further allege that these advantages enable the operator to produce his coal at a cost of from 5 to 20 cents per ton less than the cost of production to the operator who does not receive such cars *and enable the railroads to purchase their coal supply "at prices from 5 to 20 cents per ton less than the prevailing market prices on commercial coal* BY REASON OF THE ARBITRARY ALLOTMENT OF SUCH * * * COMPANY FUEL CARS TO THE MINES WITH WHICH COMPLAINANT * * * MAY HAVE CONTRACTS FOR THEIR SUPPLIES OF COAL." (Transcript No. 501, page 21; No. 502, pages 31, 32.)

So the effect of the rule or practice of the railroad companies is clear and undisputed in this record. That it gives to the contract mine a "preference or advantage" in many respects and that it subjects the non-contract mine to prejudices or disadvantages in many respects is admitted by the pleadings.

The question then arises, are such preferences or advantages, or such prejudices or disadvantages *"undue or unreasonable"* under the terms of Section 3 of the Interstate Commerce Act?

Unless such practice can be justified upon some ground of necessity or public policy we think it is clear that it is "undue" and "unreasonable." By such a practice the mine owner is placed at the mercy of the railroad company. *If the mine owner refuses to contract with the railroad company for its fuel supply at a price of from 5 to 20 cents per ton less than the market price for commercial coal he is face to face with the disadvantages and prejudices which inevitably result from the practice complained of.* He cannot operate his mine to as full a capacity and thereby he increases the cost of producing his coal and relatively reduces his profits. He cannot increase his working places or develop his mine as rapidly. He cannot increase his capacity rating but the same will be relatively decreased,and in future re-ratings his percentage of cars would be gradually but surely reduced. It will then be seen that such a practice places the mine owner absolutely in the power of the railroad company and gives to it the power of practically ruining the business of the mine operator and driving him from the field of competition with his more favored neighbors and competitors.

On the other hand, if the mine owner enters into such contract he avoids all of these disadvantages. His mine is developed and its capacity and rating enlarged so that its percentage of cars for distribution is increased.

It is within the power of the railroad company under this practice to make the small but favored mine a large one while it makes the large but disfavored mine correspondingly small.

The celebrated and leading case of *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall., 357, was based upon facts different from those here involved. The question there raised was how far a railroad company might lawfully contract for exemption from liability. But the court in discussing the relations of the carrier to the public used language which is applicable and forceful upon the question under discussion.

Mr. Justice BRADLEY said:

> "It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men may be permitted to make their own agreements, and *that it is no concern of the public on what terms an individual chooses to have his goods carried.* * * * Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, *the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts.* His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. *In most cases, he has no alternative but to do this, or abandon his business.*

> In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a carload; being a difference of three to one. Of course no drover could afford to pay such tariff rates. *This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected.* * * * The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, *amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.*"

Why is it, then, that the railroad companies are contending so strenuously for the right to continue their practice of not counting their own fuel cars? It is not that they may get their coal. The right to use cars to obtain their own fuel supply is willingly conceded to them. Neither the complainant before the Commission nor the Commission itself has ever contended or held that a railroad company might not, even in time of car shortage, *use* such of its equipment as might be necessary in order to obtain its own fuel supply. The railroad companies are common carriers charged with important duties to the public which must

be performed and the performance of such duties is undoubtedly paramount to the rights of the individual. It is not, however, because of any inherent right in the railroad company itself that it is allowed the use of such cars, but such use is allowed solely and alone because of the rights and interests of the public generally to the service owed them by the railroad company, which service could not be performed were the railroad company not allowed the use of such cars to obtain its necessary fuel. So that its right to use such cars springs from public policy and necessity and not from its own private interest.

The right to such use was clearly recognized in the order of the Commisison in the *Traer cases* which contained the following provision:

> "If the number of the carriers' own fuel cars assigned to it (the mine), is greater than its proportion, *all such cars so * * * assigned to it * * * must be delivered to it.*" (Transcript No. 501, page 36; No. 502, page 43.)

In the opinion in those cases (13 I. C. C. Rep., 457) Commissioner CLARK said:

> "A carrier may lawfully get the coal that it needs so long as it does not violate the rights of or fail in its duty to the public. It must make this contract as it must make all others, keeping in view its duty to perform its public functions and to avoid injury or damage to its shippers by reason of unjust discrimination, undue preference, or unreasonable disadvantage growing out of such contract or the performance thereof. If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, *it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof.* As be-

fore observed, however, *this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel.*"

If the counting or non-counting of such fuel cars was necessary in order to enable the railroad company to obtain its necessary fuel or to entitle it to the use of such cars a different question would be here presented, but it is clear that, by the order and opinion of the Commission, the railroad company is given the *use* of the cars for its necessary fuel, so that it may obtain its fuel regardless of whether or not such cars are counted. So is is apparent that the use of such cars by the railroad company is a matter entirely separate and distinct from and is not in any way dependent upon or affected by the counting or failure to count such cars against the mine to which they are assigned.

(a) THE APPELLEES USE THEIR PRACTICE OF NOT COUNTING SUCH CARS AS A SCHEME OR DEVICE TO GIVE AN ADVANTAGE TO THE MINE OWNERS FROM WHOM THEY BUY THEIR FUEL SO AS TO INFLUENCE AND GOVERN THE PRICE OF SUCH FUEL.

We have shown that the railroad company is given the use of its cars to haul its necessary fuel and that such use is not in any way dependent upon or affected by the counting or not counting of such cars. If that be true, then it is clear that the practice of the railroad company in failing to count such cars is not for the purpose of obtaining their use, but is adopted for some wholly separate and different purpose.

What that purpose is must be evident. If the failure

to count such cars gives, as it unquestionably does give, a larger percentage of cars to the contract mines, as well as the other advantages hereinbefore set out, then such contract mines can afford to and actually do sell to the railroad company its fuel supply at a price less than the average market price.

It is alleged in the answers:

> "That *by the arbitrary allotment* of the foreign railway fuel cars, private cars or *company fuel cars, the complainant* and the so-called foreign railways *are enabled to secure low prices on railway fuel* because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars." (Transcript No. 501, page 21; No. 502, page 31.)

Again it is alleged:

> "Defendant avers that complainant and other railroads, including foreign railroads, have been and are enabled to purchase their supplies of coal at prices from 5 to 20 cents per ton less than the prevailing market prices on commercial coal *by reason of the arbitrary allotment of such foreign* railway fuel cars, private cars, or *company fuel cars to the mines with which complainant* or such foreign railroads *may have contracts for their supplies of coal.*" (Transcript No. 501, page 21; No. 502, page 31.)

It is evident then that the sole purpose of the railroad company in failing to count said cars against the contract mine is to obtain lower prices on its fuel coal. The extent to which this may be carried is self-evident. If the operation of the practice is to enable the mine owner to produce coal more cheaply and to give to him all the advantages herein mentioned and which are alleged in the answers then it puts it in the power of

the railroad company to absolutely dictate the price it will pay for its own fuel to a point where the reduction of the price is equalled by the advantages given to the mine owner. In other words its purpose in failing to count said cars is to give to the mine owner a larger number of cars and to use such additional cars as part compensation for its coal. The practice can have no other purpose, for it can have no other effect in favor of the railroad company.

On March 7, 1906, Congress passed a joint resolution authorizing and instructing the Interstate Commerce Commission to inquire, investigate and report to Congress on several subjects, among which was the following:

> "*Fifth.* That said Commission be also required to investigate and report the system of car supply and distribution in effect upon the several railway lines engaged in the transportation of coal or oil as aforesaid, and whether said systems are fair and equitable, and whether the same are carried out fairly and properly; whether said corriers, or any of them, discriminate against shippers or parties wishing to become shippers over their several lines, either in the matter of distribution of cars or in furnishing facilities or instrumentalities connected with receiving, forwarding, or carrying coal or oil as aforesaid."

On January 25, 1907, the Commission made its report to the Senate and House of Representatives.

On page 68 of that report the Commission said:

> "(c) Fuel supply coal for railroads.
>
> All of the railroads in the territory above set forth, except the Western Maryland Railroad Company and the New York Central and Hudson River Railroad Company, appear from the evi-

dence to have treated car service for fuel of the companies on an entirely different footing from such service for coal for any other purpose, and the New York Central and Hudson River Railroad Company is not an exception as far as cars furnished to the Clearfield Bituminous Coal Corporation was concerned. The prevailing rule is that cars in which fuel coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.

The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. *The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price for fuel coal,* and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation *and gave him an advantage over a competitor who has no order for fuel coal.*

This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the lines of the road in the same proportion that cars are distributed."

Again on page 80 of the report it is said:

"Another source of discrimination in the system of car distribution on the several railroads is the assignment of cars to certain operators for fuel coal or company coal without charging such cars

against the pro rata distributive shares in the equipment of the road. In other words, treating such assigned cars as arbitrary cars and also treating cars from other roads for fuel coal as arbitrary cars and not counting them against the percentage to which the operator receiving them is entitled. *This method of distributing cars interferes with and to a certain extent nullifies any fair system of distribution which may be put into effect, creates inequalities and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel coal and the market price thereof.*"

But, as we have seen, the right of the railroad company to the *use* of such cars is referable only to public policy and necessity and is not a right inherent in the railroad company. Such policy or necessity is fully satisfied by the physical use of the cars for the necessary fuel. The right thus given to the railroad company must end with the fulfillment of the policy and necessity and cannot extend beyond it. The carrier's rights are exhausted with the physical use of such cars and it cannot acquire any right to so manipulate such use as to gain further and additional rights or advantages. The railroad company therefore has no right to adopt a rule or practice which will give to it, in addition to such use, its coal supply at a cheaper price, if such rule gives to one mine advantages over other mines similarly situated *unless the mine with which it deals in some way becomes entitled to the additional benefits arising from such rule or practice.* Such rule or practice must

therefore be sustained, if at all, because the mine operator selling to the railroad company has a right to it for' it seems clear that the railroad company has exhausted its right when it obtains the use of such cars. As is hereafter shown, the mine operator has no such right.

The railroad company cannot justify such a practice on the ground that, without it, it would be compelled to pay a higher price for its coal.

In *New York, N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S., 361, 399, Mr. Justice WHITE said:

> "It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them *will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist.*"

In *Covington & Lexington Turnpike Road Co.* v. *Sanford,* 164 U. S., 578, 596, involving the reasonable-

ness of tolls of a turnpike company, Mr. Justice HARLAN said:

> "It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. *The rights of the public are not to be ignored.* It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. *But that involves an inquiry as to what is reasonable and just for the public.* If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. *The public cannot properly be subjected to unreasonable rates in order simply that stockholdrs may earn dividends.*

In *Union Pacific R. Co.* v. *Goodridge,* 149 U. S., 680, the railroad company had contracted to purchase its coal of a coal company, and, in consideration of the price agreed upon and of the settlement of an unliquidated claim for damages in favor of the coal company, to give certain rebates.

Mr. Justice BROWN said:

> "It was no excuse for a rebate that the coal cost more or less. The right of a railroad to charge a certain sum for freight *does not depend at all upon the fact whether its customers are making or losing by their business.*"

In *Smyth* v. *Ames*, 169 U. S., 466, Mr. Justice HARLAN said:

> "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state *may fix its rates with a view solely to its own interests, and ignore the rights of the public.* But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, *but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders.*"

So even though the abolition of the practice of the railroad company would result in its paying more for its fuel supply, that result does not furnish any excuse to the railroad company for not observing the provisions of the law.

The endeavor by the coal operator to produce coal more cheaply so that it may be sold more cheaply is always proper and commendable if influenced by proper motives and brought about by proper means; but it is indisputable that by just so much as the favored coal operator is enabled to reduce the cost of his coal by reason of the greater supply of cars, by just so much will the cost of coal be increased to the coal operator discriminated against. By just so much as the railroad company is enabled to buy its coal more cheaply through this device, the public must be required to pay more for its coal.

The question as to whether the rule or practice of counting or not counting private cars, foreign railway fuel cars and company fuel cars is an unjust discrimi-

nation has been before the courts and the Commission in a number of cases.

In *Logan Coal Co.* v. *Penn. R. Co.*, 154 Fed. Rep., 497, 503, it was held that a rule of the railroad company by which such cars were *not counted* did not unjustly discriminate against the contract mine to which they were furnished.

In *U. S. ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 154 Fed. Rep., 108, Judge MORRIS held that foreign railway fuel cars and company fuel cars need not be counted. This was reversed on appeal in *B. & O. R. R. Co.* v. *U. S. ex rel. Pitcairn Coal Co.*, decided by the Circuit Court of Appeals of the Fourth Circuit in September, 1908.

PRITCHARD, Circuit Judge, said:

> "The court below, in dealing with the question relative to the fuel coal cars of the Baltimore & Ohio Railroad Company, and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. We fail to understand upon what theory the carrier can relieve itself from a charge of discrimination when it is shown that such cars are arbitrarily allotted to certain mines and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken

to secure a fair distribution of car service among shippers on its line. * * * It is manifest that it was the purpose of Congress to prevent railroad companies from resorting to such means in order to evade the requirements of the act, to-wit, a fair and equal distribution of facilities among shippers similarly situated. In determining as to whether there has been an undue and unreasonable preference in any particular instance, the sole question to be considered is as to whether all the cars handled over the carrier's lines have been *pro rated* so as to give each and every shipper on its lines his proportionate share of facilities to which he is entitled on the basis agreed upon as the means by which there should be a fair and equal distribution of such car service. Therefore, when we consider the statute, the provisions of which are plain and unmistakable, we are impelled to the conclusion *that the arbitrary allotment of the fuel cars of the company and foreign fuel cars is violative of the provisions of the act.*"

In *Majestic Coal & Coke Co.* v. *Illinois Central R. Co.*, 162 Fed. Rep., 810, it was held that the practice of *counting* private and foreign railway fuel cars was not a discrimination but that the claim of complainants that they be not counted was repugnant to the provisions of the act.

The only case which seemingly supports the practice of not counting such cars is the case of *United States ex rel. Coffman* v. *Norfolk & W. Ry. Co.*, 109 Fed. Rep., 831. In that case it was shown by the relator "that something like 300 cars were weekly distributed to the various coal operations in the field in which the Indian Ridge is situated, in which distribution the Indian Ridge Coal & Coke Company *did not participate.*" Upon behalf of the railway company it was shown

"that the 300 cars, more or less, distributed among the other operations, and in which the Indian Ridge *did not participate*, were cars placed by the railway company at the various mines, not for traffic, state or interstate, but for railroad fuel alone; and that the reason why Coffman and his Indian Ridge principal did not participate therein was because they had refused to sell the railway company its fuel coal upon the same terms that it could purchase it from other corporations."

JACKSON, District Judge, said:

> "If any discrimination at all were shown, such discrimination was fully explained and justified. The only effort, as we have seen, at such proof, was the arbitraries, which were fully explained, and the 300 coal cars, in the allotment of which Coffman *was not permitted to participate* by reason of his own fault and refusal."

We have quoted above every word of the statement of facts and opinion of the court which in any way mentions or touches upon the railroad's own fuel cars. That proceeding was not based upon rules of distribution of the defendant in any way similar to those in effect on the lines of defendants herein. In that case cars were distributed on the so-called "coke-oven basis" which was recently condemned by the Commission in *Powhatan Coal & Coke Co.* v. *Norfolk & Western Ry. Co.*, 13 I. C. C. Rep., 69. It was not shown whether or not under such basis of distribution the railway company's own fuel cars were counted. Coffman did not ask that such cars be charged against the mine receiving them, but asked that his company which had no contract for fuel with

the railroad company *should nevertheless share in their allotment and distribution.* The learned judge only states that Coffman was "*not permitted to participate*" in the allotment of these cars,—in other words, that the railroad company should be given the use of such cars as were necessary in order to provide and transport its own fuel.

In *Railroad Commission of Ohio* v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep., 398, it was held that private and foreign railway fuel cars must be counted against the mine receiving them.

And in *Traer, Receiver,* v. *C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, and *Royal Coal & Coke Company* v. *Southern Ry. Co.*, 13 I. C. C. Rep., 440, it was held that the practice of not counting private, foreign railway fuel and company fuel cars against the mine was an unjust discrimination condemned by the Interstate Commerce Act.

In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, it was held that private and foreign railway fuel cars must be counted against the mine receiving them.

(b) THE CONTRACT AND NON-CONTRACT MINES ARE SIMILARLY SITUATED.

Let us look at this matter from the viewpoint of the mine owners' rights as between themselves. Assume two mines of equal capacity, similarly located, one having a railroad contract and the other not. Their business is the same. Though one is selling to the railroad company and the other is selling to

private individuals or corporations, both are engaged in identically the same business. Each is mining, selling and loading coal into cars. Because of the nature of the business and the method of conducting it by which coal is raised from below ground and dumped directly into cars at the mine tipple the necessity for cars into which to load such coal is the same as to each. The effect of obtaining a sufficient number of cars on the amount and cost of production is the same as to each. A shortage of cars has the same effect upon each. Each mine is demanding and it is the legal duty of the railroad company to furnish cars into which said coal may be loaded. The duty of the railroad company is the same as to each mine and it may not lawfully give to the one an advantage which it denies to the other. Can the mine owners' right to the performance of this duty depend upon the character of his customer? Can it make any difference in the right of the one operator to receive cars into which to load his coal that he sold the coal to the railroad company? Can it make any difference to the mine operator whether or not (to paraphrase the language of the Circuit Judge) such coal has a consignor or consignee, whether there is a shipper, or common carrier, whether freight accrues or whether there is a vehicle transporting a commodity in commerce? The operator has nevertheless mined and sold his coal and received cars into which it may be loaded and hauled away. He never had any right to receive cars by virtue of his contract with the railroad company other than the right he would have without such a contract.

Counsel contend, and we agree, that the railroad contracts for its fuel supply in its capacity as a private corporation and not in its capacity as a common carrier charged with the performance of public duties. It seems clear that the mine operator cannot make a contract with this private corporation which will increase his rights as one of the public against the rights of others of the public. The mine operator, therefore, cannot by virtue of such a contract obtain any right to receive the larger percentage of cars which the practice of not counting them gives to him.

If the mine operator does not get the right from his contract to receive the cars without having them counted then it must follow that the railroad company has no right not to count them. If on the other hand the railroad company has the right not to count these cars, the mine operator must have the right to insist that they be not counted. If this does not follow, then it must be admitted that the railroad company would have a right to count them or not as it pleased, without regulation or hindrance, and thus give it power to change at will the distribution of its entire car supply.

In the case of the *Logan Coal Co.* v. *Pennsylvania R. Co.*, 154 Fed. Rep., 497, a bill was filed by a coal company having a railroad contract, claiming that a rule of the railroad company counting such cars against the mines unjustly discriminated against it. After holding that private cars must be counted, HOLLAND, District Judge, said:

> "What has been said in regard to individual cars applies to the use of fuel cars, *whether they be those of the defendant company,* or fuel cars of

other corporations purchasing coal from the relator. *They should be treated the same as individual cars in the distribution of available cars*, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars, whether individual cars *or owned by the railroad company*, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable *pro rata*, to shippers desiring their use along the line, upon a basis giving each equal facilities with the other."

This is a direct holding that a mine operator has no right to insist that such cars be not counted against him and clearly shows that a contract and a non-contract mine are similarly situated.

See also,

Majestic Coal & Coke Co. v. *Illinois Central R. R. Co.*, 162 Fed. Rep., 810.

The rights of mine operators are and must be equal provided they are similarly situated. If fuel cars are counted against the mine to which they are sent it would no doubt have the effect of increasing the price which the railroad company would be compelled to pay for its own fuel. But is that an answer to the proposition? Has the railroad a right to discriminate solely on the ground that it can thereby save money? Does that justify a discrimination which, unless in some way justified, is "unjust" and condemned by the Inter-

state Commerce Act? As well might the railroad seek to justify the enforcement of an unreasonable rate or the granting of a rebate on the same ground, for these devices are no doubt used to benefit the treasury of the company.

But why will the counting of such cars increase the price of railway fuel coal? The answer is obvious. The mine owner must, under the present practice of not counting such cars, be receiving adequate consideration for the reduction in the selling price which he makes to the railroad company. Such consideration can only be the higher percentage of cars which he receives. If a mine is selling coal to the railroad company at a price below the regular market price and as a consideration such mine is receiving a higher percentage of cars than it would otherwise receive it is plain that if the railroad ceases giving it the additional cars the consideration for the low price of coal fails and the mine owner will thereafter refuse to sell at such low price. Such a practice, amounting as it does to a purchase, with unjust discriminations and advantages as a large part of the consideration, cannot stand for a moment. It is condemned by the very terms of the Interstate Commerce Act.

It must be remembered also that the railroad makes its contracts for fuel supply in its capacity as a private corporation and not as a common carrier. We have shown, heretofore, that part of the consideration of such contract is the giving to the operator a larger percentage of cars than he would otherwise receive. But from what source does the railroad obtain the additional cars with which it partly pays for its coal?

Surely not from the cars used for railway fuel, for that would not constitute an additional supply. Such additional cars, the furnishing of which partly constitutes the consideration for or purchase price of its coal, must of necessity be taken from its supply of cars available for general use and distribution. To the use of such cars the public is entitled, not the carrier. Every additional car given to such a mine must be taken from the number which the railroad as a common carrier is bound by law to furnish and distribute equitably. As to such cars the railroad owes a duty to the public which must be performed equitably and fairly and without unjust discrimination. *It is to be remembered that we are dealing with periods of car shortage* when coal operators cannot obtain a supply of cars for their entire output. Under any equitable rule of distribution there are periods when the mines will fall short of their requirements. They are, however, entitled to the full available equipment of the road and have a right to demand a fair distribution. If the railroad is entitled to use part of its available car supply as part payment for its coal, then there is no limit which can be set to such practice and it could use practically all of its available equipment for the purpose of obtaining a still lower price for coal, under what it calls private contracts, and thereby practically deprive mines, with which it has no contracts, of a supply of cars. If the railroad may *partly* pay for its coal by additional cars, why may it not *wholly* pay therefor by giving to such mines a still larger number, even to the extent of all available cars, and thus put itself in a position where

it would be impossible to perform its duties to the public and thereby, for lack of further facilities for transportation, compel all other coal mines on its line to close and cease business. In fixing the consideration for such contracts the railroad seems to forget for the moment that it is acting in its private capacity, as contended by counsel, and to overstep the line of demarkation between its private rights and its public relations and duties.

The law does not look to the form in which the thing is done but to its effect and the purpose and intent of the parties. It will not allow a public corporation to excuse its violation of the law on the pretext that at the moment it was acting as a private corporation though in such a manner as to evade the performance of its public duties.

(c) SUCH PRACTICE IS ONLY OPERATIVE DURING TIMES OF CAR SHORTAGE AND BY IT THE RAILROAD COMPANY IS ENABLED BY REASON OF ITS FAILURE TO FURNISH ADEQUATE EQUIPMENT, TO OBTAIN A REDUCTION IN PRICES AND TO GIVE TO ITS CONTRACT MINES AN UNDUE ADVANTAGE OVER NON-CONTRACT MINES.

That it is the duty of a railroad company to furnish transportation facilities to meet the demands of the public needs no citation of authorities to this court. It is true, as alleged in both bills and answers, that during part of the year the railroad companies' equipment is sufficient to transport all the coal offered them, but that during a portion of the year there is a car shortage during which time it is impossible for them to furnish to all mines from their available equipment

sufficient cars to transport all of the coal offered by the operators.

The railroad companies can only give to the contract mines the advantages hereinbefore set out as part consideration for their coal during periods of car shortage. *The greater the car shortage the greater and more valuable the advantages given to the mine owner and consequently the greater the reduction in price to the railroad company.* The railroad is thus enabled, by the operation of this device or practice, to take advantage of its own failure to furnish adequate facilities and to turn such failure to perform its duty to the advantage of itself and its favored mines and to the disadvantage and detriment of the non-contract mines.

(d) SUCH CARS EVEN WHEN IN USE BY THE RAILROAD COMPANY IN TRANSPORTING ITS OWN FUEL ARE STILL A PART OF THE EQUIPMENT OF THE ROAD AND WITHIN THE TERMS OF THE INTERSTATE COMMERCE ACT.

It has been strenuously urged by counsel and was held by the Honorable Circuit Judge that because such cars while so used were not engaged in commerce they were not included within the terms of the Interstate Commerce Act, and that therefore the railroad company's practice in regard to them could not be regulated by the Commission.

The bills allege and the answers admit that "cars for complainants' own fuel supply do not constitute a part of complainants' available equipment for *commercial shipments.*"

In the opinion of BAKER, Circuit Judge, it is said:

> "Coal is bought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroad's coal chutes. All is for the complainants' own consumption.
>
> Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel." (Transcript No. 501, page 54; No. 502, page 62.)

We have, we believe, previously shown that the railroad company is allowed the use of such cars not because of any right of the railroad company as such but because of the rights of the public generally. The cars are at all times a part of the equipment and transportation facilities of the road. to the use of which the public is entitled, and it is only by virtue of public policy and necessity that the railroad company is allowed to withdraw such cars from the use of the public and use them to carry its fuel coal. While being used to transport such railroad fuel such cars are engaged in a public use for the benefit of the public and not alone of the railroad company.

The hauling of such coal may not constitute a "shipment," but it does, we submit, consti-

tute a "carriage" within the terms of Section one of the Interstate Commerce Act. We have shown that the term "transportation" is defined by the first section of the act to include cars and other vehicles and all instrumentalities and facilities of shipment or "*carriage,*" irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection therewith. Even though the hauling of such coal does not constitute a "shipment" it does clearly constitute a "carriage." The word "carriage" must be construed as meaning something different than the word "shipment," else why were both used in the act? It will be noted that the disjunctive "or" is used, which makes it the clearer that "carriage" was intended to cover that which might not be included in the word "shipment."

Again, the use of such cars is granted that the railroads may obtain coal with which to operate their engines and trains *which are engaged in interstate commerce* and is therefore an indispensable and necessary part of that interstate commerce itself.

In *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S., 1, it was held that a dining car standing on a side track, to which an engine was being coupled for the purpose of turning the car around preparatory to its being picked up and put on to an interstate train on its arrival, was within the Safety Appliance Act which covered only the equipment of cars engaged in interstate commerce. There the car was not attached to any interstate train, was on a side track and was being moved so that it might be coupled into such train on its arrival. Here are cars loaded with coal to be put

into the tenders of engines that they may haul interstate trains and carry on interstate commerce.

(e) EVEN THOUGH SUCH CARS WHEN TRANSPORTING THE RAILROAD'S FUEL MAY NOT THEMSELVES BE ENGAGED IN COMMERCE, STRICTLY SPEAKING, THE FAILURE TO COUNT THEM DIRECTLY AFFECTS THE DISTRIBUTION OF THE REMAINING CARS WHICH ARE ENGAGED IN INTERSTATE COMMERCE.

We again assert that it is not the use of such cars by the railroad company of which we are complaining. Our complaint is against what we conceive to be the illegal, unjust and discriminatory scheme or device of the railroad company by which it seeks to get, *not the use*, but other private advantages growing out of such use, and in return to give to the contract mine an unfair share of the limited transportation facilities.

Even if such cars, when so used by the railroad company, are not themselves within the terms of the act, they become subject to the act when by any scheme or practice their use is so manipulated as to have a direct and immediate effect upon the distribution of cars which are engaged in interstate commerce.

And in determining whether or not the rule or practice complained of has a direct and immediate effect upon interstate commerce it must be again remembered that the failure to count the cars used for railway fuel does not in any way whatsoever affect such cars or their use. Whether counted or not such cars are used by the railroad company and are received and loaded by the mine operator. The rule or practice has no ef-

fect upon them *but only governs the distribution of the remaining equipment; that is,* THE CARS WHICH ARE ENGAGED IN INTERSTATE COMMERCE.

The *use* of cars by the railroad company for its own fuel or their character while so used cannot therefore affect the question at issue. It is only the validity of the *rule, or practice based upon such use,* which is here in issue.

It has often been held by this and other courts that matters and things which did not in themselves constitute interstate commerce but which have a direct and immediate effect upon such commerce become subject to all the provisions of the Act to Regulate Commerce. Upon this principle state constitutions and statutes, acts of voluntary associations, practices of railroad companies, private contracts and the like have been declared null, void and unlawful.

In *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S., 217, Mr. Justice HOLMES in considering the validity of a tax levied upon the property of the railroad company said:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. *If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard* v. *Morgan,* 185 U. S., 27, 37. *Asbell* v. *Kansas,* 209 U. S., 251, 254, 256."

In *Loewe* v. *Lawlor,* 208 U. S., 274, there was a combination of labor organizations and the members thereof to compel a manufacturer to unionize his shops and on his refusal so to do to boycott his goods and pre-

vent their sale in other states. This was a suit for damages brought under the Federal Anti-Trust Act. Mr. Chief Justice FULLER said:

> "In our opinion, the combination described in the declaration is a combination 'in restraint of trade or commerce among the several states,' in the sense in which those words are used in the act, and the action can be maintained accordingly. And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action *which essentially obstructs the free flow of commerce between the states*, or restricts, in that regard, the liberty of a trader to engage in business."

Again he said:

> "The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other states, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the state, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. *If the purpose of the combination were, as alleged, to prevent any interstate transportation at all, the facts that the means operated at one*

end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.''

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S., 211, it was claimed the "power of congress to regulate interstate commerce" is limited to its protection from acts of interference by state legislation or by means of regulation made under the authority of the state by some political subdivision thereof, including also congressional power of common carriers, elevator, gas and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

Mr. Justice PECKHAM said:

"The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which, from its general and great importance, has been granted to Congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, *even though such regulation is effected by means of private contracts between individuals or corporations, is illegal,* and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the state itself * * *

The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed, is vested in Congress, and when Congress has enacted a statute such as the one in ques-

tion, *any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute.*"

In *re Debs*, 158 U. S., 564, Mr. Justice BREWER on page 581 said:

"It is curious to note the fact that in a large proportion of the cases in regard to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. *If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?*"

In *Atlantic Coast Line* v. *Wharton*, 207 U. S., 328, Mr. Justice PECKHAM said:

"That any exercise of state authority, in whatever form manifested, *which directly regulates interstate commerce*, is repugnant to the commerce clause of the constitution is obvious."

In the *Employers' Liability Cases*, 207 U. S., 463, Mr. Justice WHITE on page 495 said:

"But we may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. *On the contrary, the test of power is not merely the matter*

> *regulated, but whether the regulation is directly one of interstate commerce,* or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

In *Asbell* v. *Kansas,* 209 U. S., 251, involving the validity of the "cattle inspection" law of the state of Kansas, Mr. Justice MOODY while recognizing the right of the state to pass police measures which might indirectly affect interstate commerce said:

> "The state may not, however, for this purpose exclude all animals, whether diseased or not, coming from other states, *Railroad* v. *Husen,* 95 U. S., 465, nor *under the pretense* of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other states; *and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law it is really and substantially a regulation of foreign or interstate commerce which the constitution has conferred exclusively upon the Congress."*

In *Northern Securities Co.* v. *United States,* 193 U. S., 197, the Securities Company contended that the only question was as to the right to acquire and hold stock in other state corporations and that this was not interstate commerce. Mr. Justice HARLAN in the opinion characterized such argument as "the setting up of mere men of straw to be easily knocked down." The court in that case looked to the effect of the consolidation and not alone to the means employed to accomplish it and declared it to be unlawful because its effect upon interstate commerce was direct and imme-

diate and brought it within the provisions of the Anti-Trust Act.

The Anti-Trust Act, which has so often been held to be a valid exercise of the power conferred upon Congress by the Constitution, is directed to combinations and conspiracies not in themselves interstate commerce and where the means employed to bring them about are not themselves interstate commerce but where they directly effect such commerce by restraining or preventing such commerce.

See also,

Interstate Commerce Commission v. *Baird,* 194 U. S., 25.

Swift & Co. v. *United States,* 196 U. S., 375.

Montague v. *Lowry,* 193 U. S., 38.

In *U. S.* v. *Wells Fargo Express Co.,* 161 Fed. Rep., 606, KOHLSATT, Circuit Judge, said:

> "It thus appears that, while Congress takes jurisdiction of the matter of interstate commerce under the provision of the Constitution pertaining thereto, it in so doing draws to itself full power to deal with all questions arising in that field, and, among others, the right to declare what shall be and what shall not be permitted therein, subject only to other constitutional provisions, and so to determine what matters are comprehended within the spirit of the act. It may, therefore, not be said, as an abstract proposition, that in respect to the classes claimed by defendant not to be connected with trade or commerce in any manner, with whom the carrier has no dealings in its common and accepted relation to the public, to use counsel's phrase, that gratuitous service is not commerce in any sense of the term, and not forbidden, either by the letter or spirit of the interstate commerce act. *The statute applies to all acts*

which directly or indirectly affect interstate commerce."

In the opinion filed in these cases Circuit Judge BAKER in speaking of the private cars said:

> "It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business. Where federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. *No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce.* In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions and *regulation of carriers,* all must give way." (Transcript No. 501, page 54; No. 502, page 62.)

Let us therefore inquire whether the failure to count said cars has such a direct effect upon the distribution of cars which are engaged in interstate commerce as to make them subject to the Act to Regulate Commerce and to bring the practice as to them within the jurisdiction of the Interstate Commerce Commission.

We shall attempt to show the workings of the three different systems of distribution:—

(1) The practice of the railroads.

(2) The practice advocated in the opinion of the Circuit Judge.

(3) The practice provided for in the order of the Commission.

Under the railroad company's practice, if a mine has a rated daily capacity of 1,000 tons and has a contract by which it furnishes to the railroad company 500 tons a day it receives, in addition to the cars for such fuel coal, its full percentage of cars for general distribution *still based* upon a capacity of 1,000 tons. For the purpose of car distribution this mine starts with a capacity of 1,000 tons, exhausts one-half of it through the use of the railroad companies' instrumentalities and facilities of carriage and still retains the whole. Assume a fifty per cent. car shortage. This mine would receive 500 tons for the railway fuel, and in addition fifty per cent. of its 1,000 tons capacity or 500 tons for other coal, thus receiving its full capacity of 1,000 tons, while its neighbor and competitor without a railroad contract but with equal capacity and otherwise similarly situated would only receive its fifty per cent. or 500 tons.

The practice advocated in the opinion of the Circuit Judge is set forth in the following language in his opinion:

> "The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in *commerce*. If two mines have a capacity of producing 1000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of their mines, by reason of exhaustion of a vein, of flooding of a shaft, or the operators' local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine. And we per-

ceive no just ground for a difference if the mine's diminished capacity comes from the carriers' act. While the carrier's cars that are being employed in hauling its own fuel are not a part of the available commercial equipment, yet the diminished capacity of the mine to tender coal for transportation in commerce should be taken into consideration, and computing the average number of the carrier's own fuel cars set out at a mine may be the easiest and surest way of gauging that mine's diminished capacity." (Transcript No. 501, page 55; No. 502, page 63.)

While this is practically a holding that the present practice of the railroads is wrongful, the decree entered enjoins the enforcement of the order of the Commission *but allows such wrongful practice to continue.*

Under this plan the contract mine would first receive its 500 tons for railway fuel and its "capacity" as a basis for car distribution would be reduced by that amount to 500 tons. It would also receive fifty per cent. of its reduced capacity, which would give it an additional 250 tons or an aggregate of 750 tons, while its neighbor and competitor would receive but 500 tons.

Under the plan provided for in the order of the Commission, where the railway fuel cars are counted each of the mines would receive 500 tons.

It would seem that the mere statement of the working of the railroad company's practice conclusively shows that it works an unjust discrimination and that it is a violation of the Act to Regulate Commerce. As before stated, it was held by the Circuit Judge to be a wrongful practice. It has been previously shown, we believe, that it is not warranted by necessity; that it is based solely and alone upon the selfish interest of the

railroad company, and is simply a scheme or device to partly pay for its fuel supply by giving to the operator more cars than he would otherwise receive, and thus use "facilities of transportation," demanded by but refused to the public, as part consideration in a private contract between the railroad and mine owner.

The rule proposed by the Honorable Circuit Judge is wholly based upon what would be just and proper in case of the exhaustion of a vein, etc. If there is a "*difference*" between a diminished capacity arising from the carrier's own act and one arising from any of the other causes cited by him, then his reasoning fails and the foundation of his rule falls. We think we can show a clear and well defined "difference." If a vein is exhausted or a shaft flooded so as to prevent its further operation, *then there is an actual diminution of capacity itself* and under any equitable rating of mines according to capacity such diminution must be recognized and taken into consideration. *That is not due in any way to the use of any of the facilities of transportation, but only to physical conditions at the mine itself.* The "operator's local consumption of his own fuel," while it does not change or affect the actual capacity of the mine does, as stated by the court, affect only the amount offered for transportation, but *such local consumption does not demand the use of any of the facilities of transportation; it is not loaded into cars; its consumption cannot therefore affect the distribution of cars.* It is undoubtedly true that in arriving at the capacity of such mine upon which car distribution

should be based such "local consumption" should be considered. This was clearly recognized by the Commission in these cases. In his opinion in *Tracy* v. *C. & A. R. R. Co. et al.*, 13 I. C. C. Rep., 451, 455, Commissioner CLARK said:

> "If two mines of equal daily capacity are located on the line of a carrier, and one sells its entire output locally and the other does not sell any locally, but its entire output must find some other market, it is clear that, although the capacities of the mines are the same, and each would be entitled to the same percentage of cars if they were both offering their output to the company, the one *would not be entitled to a rating because it would tender no coal* and the other would be entitled to the equipment of the company for that day, and if it was sufficient to move its output, both mines would be on an equality, so far as the selling of their output is concerned. But if one mine sells one-half of its output locally and the other none at all, and the carrier has only enough cars to transport one-half the combined output of the two, *it would be unfair for the carrier to rate the mine selling one-half of its output locally at the same tonnage as the other mine and give to it one-half of the cars that it had on a given day.*"

The Honorable Circuit Judge also says:

> "These cars are withdrawn from complainant's available commercial equipment, *just as are flat cars while being used to distribute gravel for ballast.*" (Transcript No. 501, page 55; No. 502, page 63.)

The example used is not applicable here. As a rule the railroad company owns all the gravel beds to which such cars are sent and in that case there is no question of counting or not counting the cars used to carry such gravel, and no shipper is thereby given an unfair ad-

vantage in the distribution of cars. In such case distribution of cars is not in any way dependent upon such use of cars by the railroad company to haul the gravel. If, however, the railroad were obtaining its gravel from beds owned by private individuals or corporations and were attempting in the distribution of cars to favor those with whom it had contracts for gravel as against those with whom it had no such contracts then the same rule would and must be applied which would be applicable in this case.

During a car shortage the use of such cars for railroad fuel deprives the public of a benefit to which it would otherwise be entitled. The number of cars which each mine would received is reduced *pro rata* so that the railroad may continue to operate, and therefore the distribution of the cars engaged in interstate commerce is directly affected by the use of cars by the railroad company for the purpose of transporting its own fuel. This "difference" is so clear and apparent that the whole plan suggested and based upon the fact that no "difference" exists, must fall.

In his argument the learned Circuit Judge clearly recognizes the principles contended for by us, but by his proposed rule he merely mitigates such discriminations but does not eliminate them.

The practice provided for in the order of the Commission on the other hand gives to the contract and non-contract mines of equal capacity an equal number of cars. It is based upon the fact that each of said mines is similarly situated and that the fact that with one of them a railroad company is the customer while with the other a private individual or corpora-

tion has purchased the coal does not alter the character of the transaction or give to one any greater rights than it gives to the other. We think the reasoning of Commission CLARK in his opinion filed in the *Traer case*, 13 I. C. C. Rep., 451, in support of the order made therein is unanswerable.

The practice of the railroad company and the practice proposed by the Honorable Circuit Judge are based upon their theory that the cars hauling the railroad company's coal are not while so used themselves engaged in commerce and therefore the courts and the Commission have no jurisdiction over them. Let us suppose that in a time of car shortage a railroad used practically all of its cars to haul coal for its own fuel to an extent absolutely unnecessary. It would thereby withdraw its cars from "commerce," according to the contention of the railroad company and of the Circuit Judge. Would it be said because such cars were not engaged in interstate commerce the courts and Commission were powerless and coal operators and the public must suffer without hope of relief? We assume not. Both the courts and the Commission would have ample power to prevent such a practice and would compel the railroad company to cease using such cars except to such an extent as was necessary to obtain an adequate fuel supply. Why is this so? The cars under this theory would not be engaged in commerce. It must be because the use of such cars is not demanded by public policy and necessity and cannot be allowed to be thus unnecessarily withdrawn from commerce at the mere whim of the railroad com-

pany. The *jurisdiction* of the courts and the Commission over the *practices in regard to the use of such cars* does not therefore depend upon whether or not they are at the time actually engaged in commerce, for the fact that such cars have been unnecessarily *withdrawn from commerce* furnishes the very ground for the exercise of jurisdiction.

We again quote from Commissioner CLARK's opinion in the *Traer case*, 13 I. C. C. Rep., 457, 458:

> "If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof. As before observed, however, this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel. But if a carrier had a contract for more cars of fuel per day than it needed, neither such contract, nor considerations of public policy which recognize the public necessity for fuel, would justify it during a period of car shortage in using its equipment for a superfluous supply when such equipment was demanded and needed by the shippers and the public."

The logic of this reasoning is evident. It is based upon the fact that the use of cars by the railroad company and withdrawing them from the use of the public has an immediate, direct and necessary effect upon interstate commerce itself, and therefore such use of such cars and the practices in relation thereto are subject to regulation under the provisions of the Act to Regulate Commerce. If it were not so the railroad company might, without power in the courts or Commission to interfere, use its entire equipment for its own

purposes on the pretext that such cars were not then engaged in commerce and thus refuse to perform its public charter duties, thereby directly violating that clause of the first section of the Act to Regulate Commerce which provides that,

> "It shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

Let us assume that there are ten mines on the line of a railroad and that each has a daily capacity of one thousand tons. The company has 200 available coal cars of 40 tons capacity each. It has contracted with each of five of said mines for 600 tons daily, which will require 75 cars per day, 15 for each of the contract mines. We concede that the company has a right to use these 75 cars. We have shown that the use of such cars is a matter separate and distinct from the counting or non-counting of them. Under the rule laid down by the Commission each of the ten mines would receive 20 cars or one-tenth of the whole number. This would give to the contract mines not only the 15 cars received for the railroad fuel but five in addition to be used for other coal. The contract mine could not object, for it has received the same number as the other mines. "But," says the railroad company, "under such a plan, while we can get our necessary fuel, we stand the same as any other customer, and do not obtain the advantage in price which it is possible to obtain if we take some of the cars from the non-contract mines and give them to the contract mines. We will therefore adopt a rule or practice by which we will not count against the contract mines the

cars used for our own fuel. Under this rule we will arbitrarily give the five contract mines the 15 cars each and we will then divide the remaining 125 cars equally among the ten mines, giving 12½ cars to each. This will give the contract mines 27½ cars each while the non-contract mines will only receive 12½ cars each. Of course the contract mines must give something in return for this and the compensation shall be to give us our coal at a much lower price than we would pay if we counted such cars."

Has this practice of the railroad company affected interstate commerce immediately and directly? It has reduced the number of cars with which the non-contract mine may carry on such commerce from 20 to 12½ and it has increased the number received by the contract mine from 20 to 27½. These relative numbers vary only as the railroad company uses more or fewer cars to obtain its coal. It is not the use of the cars that has this effect. It is the practice which is put into play only after the railroad gets the use of such cars. It is the practice alone that has this effect upon interstate commerce. It is a practice based upon no public or even private necessity, a practice originated by the railroad company solely for private gain, regardless of its injurious effect upon the general public, and regardless of the rights of the public and the duties imposed by the law of the land.

In *Majestic Coal & Coke Co.* v. *Illinois Cent. R. Co.*, 162 Fed. Rep., 810, Judge KOHLSAAT said:

> "Complainant filed its bill to restrain defendant from including certain private cars and certain so-called 'foreign fuel cars' in estimating the distributive share or quota of complainant in

and to defendant's 'system cars,' so called. From the bill it appears that heretofore complainant has been awarded its *pro rata* number of 'system cars' without reference, and in addition to the private and foreign fuel cars employed in connection with its business. It is alleged in the bill that in this way it has been able to work its mine at its full capacity, whereby it could produce coal at reduced rates. This rate manifestly would be available for interstate shipments, although *the bill alleges, and the demurrer admits, that the private and foreign fuel cars were engaged solely in intrastate trade.* It further appears from the bill that complainant has entered into contracts on the basis of the old allotment of cars, which it cannot afford to carry out on the new basis of distribution of system cars.

It is claimed for complainant that, inasmuch as the private and foreign fuel cars deal only with intrastate transactions, the transactions in question do not come within the terms or spirit of the interstate commerce act. It is the plain intent of the act that railroad companies shall not extend any advantage to any shipper. It follows, therefore, that any act of a railroad company which directly or indirectly results in the extension of advantage to any one or more shippers over other shippers dealing with that road in interstate commerce is forbidden by the statute. It appears from the bill that the defendant is engaged in such commerce. There exists, therefore, this situation, viz.: The railroad is giving to the coal company facilities, in intrastate commerce, it may be, which enable the latter to place its coal upon the market for interstate shipment at a less price than that at which other coal mines can afford to sell coal. Of course, such a situation might arise from other causes, as, for instance, more accessible strata or greater quantities of coal or better mining facilities or lower wages. These advantages might be lawful in themselves, and

not at all within the statute, and would be proper data to be considered in fixing the quota of cars. The law, however, deals with the interstate carrier. It may not in any way become a party to complainant's unfair advantage over other shippers in affording greater facilities *pro rata* to one shipper than to another. It is a creature of the law, and amenable to the varying provisions thereof. *It was quite within the power of Congress to enact that a railroad shall not lend its great advantages to any enterprise which in any way seems to discriminate in favor of or against any person dealing with it. That it is doing so in this case is beyond question.*

The fact that the new rule would work hardship upon the complainant or place it at disadvantage is one which the court may not consider. Complainant's claim in the premises, as appears from the bill, comes within, and is repugnant to, the statute, and cannot be sustained. This finding is in accordance with the decisions in *U. S. ex rel. Pitcairn Coal Company* v. *B. & O. R. R. Co.* (C. C.), 154 Fed., 108, and *Logan Coal Co.* v. *Penn. R. R. Co.* (C. C.), 154 Fed., 497, and by the decision of the Interstate Commerce Commission July 11, 1907, in the cases of *Railroad Commission of Ohio* v. *Hocking Valley Ry. Co.* and *Wheeling & Lake Erie R. R. Co.*"

In that case it stood admitted that the private and foreign fuel cars "*were engaged solely in intrastate trade.*" How then was the question of their distribution within the jurisdiction of the court under the Interstate Commerce Act? It was because the practice there involved had a direct and immediate effect upon interstate commerce.

We cannot more forcibly and logically state our position in this case than to call attention to the language of the court in the recent case of *New York,*

New Haven & Hartford R. Co. v. *Interstate Commerce Commission,* 200 U. S., 361. In that case the Interstate Commerce Commission filed a petition, under the provisions of the Act, in which it alleged, among other things, that the Chesapeake & Ohio Railroad Company was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News in Virginia, for delivery thence to the New Haven road in Connecticut, and that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others; that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News and thence by water to Connecticut for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery; that the price of coal at the mines where the Chesapeake & Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton. The Chesapeake & Ohio claimed, among other things, that although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, because, if such difference

existed, it was a loss suffered by the Chesapeake & Ohio not from taking less than its published rates *but because it had received less as seller than the coal had cost.* The petition prayed for an injunction against each of said railroads against the carrying out of such contract.

Mr. Justice WHITE said:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the 2d section of the act, that no departure from the published rate shall be made, 'directly or indirectly,' *how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character?* For, of course, if a carrier has a right to disregard the published rates *by resorting to a particular form of dealing,* it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the

published rates shows that *the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.* If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, *to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other,* and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: if a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able

to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road."

After quoting at length from authority he further said:

"It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended

they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning 'undue or unreasonable preference or advantage,' 'undue or unreasonable prejudice or disadvantage,' and 'unjust discrimination,' are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed

to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. *This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.*"

The principles above laid down are equally applicable and the language of the court is equally decisive in the cases now before the court. There, as here, the carrier urges that it dealt in its private capacity, in the one case selling coal and in the other buying it, and that therefore its acts cannot be controlled or questioned under the Act to Regulate Commerce regardless of the effect of such acts. In each case the carrier attempts to "take itself from out the statute * * * * by simply electing to be" a seller or buyer. In each case the carrier seeks to disregard the provisions of the Act "by resorting to a particular form of dealing." In each case, under the carrier's contention, the carrier would possess the right to treat the owners of like commodities by entirely different rules. In the one case the carrier by compelling all to sell to it would monopolize all the business in its own hands or in the hands of the favored operator, while in the case at bar the carrier is enabled to accomplish practically the same result by compelling the operator to sell to it at whatever price it may name.

In that case, as in this, the railroad company sought by a mere device or scheme, which had a direct and

immediate effect upon interstate commerce, to accomplish a result condemned by the Interstate Commerce Act. There the court looked through the disguise and ascertained the true purpose, intent and effect of the practice, and declared the necessary result of the practice to be the real purpose of the scheme and branded it as unlawful and discriminatory. It seems to us that the real purpose and effect of the practice is even more apparent here, and the illegality and unlawfulness of the practice more patent, and we ask the court to place upon it the stamp of illegality, thereby giving to it the condemnation it deserves.

This is indeed a question of vast and far reaching importance. The situation here presented exists wherever mines are operated and wherever the product of such mines engages the facilities of transportation of railroad companies. The rights of the general public and the whole future of the coal industry are directly involved. There is no situation which is calling more loudly for action. If, as we believe we have shown, this practice constitutes undue and unjust discrimination it should cease and a practice be adopted which would treat all equally where similarly situated.

Respectfully submitted,

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RUSH C. BUTLER,
Solicitors for Horace Lowry, C. E. Wales and J. L. D. Speer, as Receivers of Illinois Collieries Company.

CASSODAY & BUTLER,
Of Counsel.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*
No. 232.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*
No. 233.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEES.

GARRARD B. WINSTON,
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GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant*, vs. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee*.	No. 501.
INTERSTATE COMMERCE COMMISSION, *Appellant*, vs ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee*.	No. 502.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT.

Appellant's statement of fact should be supplemented by a more detailed discussion preliminary to any argument.

Located throughout the central and southern portion of the State of Illinois are numerous bituminous coal mines. It is from this field that the industries and cities of northern Indiana and Illinois

derive a large portion of their fuel, and the lines of the appellees' railway are the highways over which the product of the mine moves to its market in and around the City of Chicago. It is with the various relationships between these appellees and the mines that the present case is concerned.

The appellees are not engaged in selling coal, nor in purchasing, except such only as from time to time is requisite for their necessary operation. The interest of the appellee railway companies in the mines along their lines is two-fold. (1) It is necessary that appellees have a constant, unvarying source of fuel supply, in order that they may be in a position to operate their lines economically and without interruption and carry out the duties imposed upon them by law as common carriers of property tendered for transportation. The appellees become, therefore, customers of the mines to the extent of their necessary fuel demands, and a relation of purchaser and seller exists. (2) On the other hand, the mines have property which they desire transported over the appellees' rails to market in other cities. When this property is so tendered for carriage the appellees' interest in the coal is that of a common carrier. The appellees assume liability as insurer of the product transported, perform a service for the mine, and receive the compensation provided for in their tariffs filed and published in accordance with law. This is what we may term the appellees' traffic relation with a shipper as distinguished from their relation as mere purchasers of a commodity which a mine offers for sale.

The situation, from the coal operators' point of view, is somewhat different. The mines are engaged in

producing and disposing of coal; it is their business to sell coal at the highest price they can obtain, at the least expense to them, and to anyone to whom coal can be delivered. In other words, the operators desire to make their business as profitable as possible. There are several elements, however, which enter into the question of profit, and which may be considered at this time. It is particularly true, in the operation of a coal mine, that the more coal a mine produces, the less the cost per ton to the operator to deliver the coal at the surface. Various elements give rise to this condition. In addition to the usual charges which remain fixed, as for instance interest upon the investment, depreciation upon machinery and buildings, and salaries of officers, there is a large element of expense involved in keeping the mine pumped out and ventilated. This cost is the same whether one or one thousand tons of coal are brought to the surface per day. Then, too, the mines operating upon full time are able to keep their working forces intact and more efficient, are able to develop and perfect their working places and produce coal more economically.

A mine must dispose of its commodity as soon as it is delivered at the surface, for it is not practical for an operator to store coal, and the amount of coal that a mine will produce, therefore, is directly connected with the amount that it can dispose of on that day. Any method of disposition is satisfactory. Tonnage from shafts located near or within cities of considerable size is disposed of locally to dealers and industries who haul the coal from the mine tipple in wagons, some the mines use themselves for the necessary operation of their machinery, some is sold to the appel-

lees and loaded into the appellees' locomotive tenders or special coal cars at the tipple, the balance, however, must find a market elsewhere, and this tonnage is tendered to the appellees for transportation from the mine to the dealers and industries in other cities. The production of coal, therefore, by a given mine directly depends on its daily position to use either in the mines' own boilers, or to dispose of to the community or the appellees locally, or to ship to market elsewhere.

We may sum up the situation of the mine as follows: A mine may sell either locally or after transportation over the appellees' rails to market. In either case, at a given price the profit is the same, and the more it disposes of in any way, the less the expense of mining per ton. As to coal sold locally and delivered at the tipple to the purchaser, the mine has no traffic relation with these appellees, even though they, themselves receive the coal. There is there no freight, no right as a shipper, no tariff and no liability as a carrier on the part of the appellees. As to coal sold upon the market in other cities, the mine, or the person to whom it sells the coal, is interested in the transportation of that commodity from the tipple to destination. The appellees are interested in the carriage of the commodity and in the freight received thereby. As to this coal there is a consignor, consignee, freight charges, tariff, common carrier liability, in fact everything which constitutes a traffic relation between the mine and the appellees.

Coming now to the handling of the commodity which the mines desire transported to market in dis-

tant cities, we have this situation disclosed by the record. Most of the year the appellees have equipment amply sufficient to transport every ton of coal tendered in commerce, but during the early winter months the demand for coal suddenly rises, with the demand the price rises, and every mine is desirous of getting coal to market. There results upon the lines of these appellees a shortage of cars available for conveying the coal tendered for transportation from the mines to destination elsewhere. This car shortage lasts for two or three months, and then business becomes more normal, equipment is freer, and sufficient cars are available for commercial shipments. At no period, even during times of car shortage, is there any scarcity upon the lines of these appellees of motive power or any facility of transportation other than cars.

During these periods of car shortage the appellees have been obliged to devise a method of equitably distributing the cars available for commercial shipments among the mines tendering coal for transportation. As a basis of distribution each mine is given what is known as a "daily tonnage rating." Neither the method of determining the rating nor its basis is material to the issues in this case, for there has been no question as to its fairness in the original complaint before the Commission (R. 501, pp. 24-28) in briefs and argument of counsel before that body, or in the pleadings and briefs in this case, and as the Interstate Commerce Commission states, in its opinion (R. 501, p. 30) "ratings are not at issue in this controversy." We may dismiss all question of rating, then, with the simple explanation that it is based

on the amount of coal a given mine can produce and load in a day.

The sum of the rating of all the mines is then taken, and equipment available for transportation of coal to market—the *commercial equipment* of the appellees—is distributed among the various mines each day upon the ratio the rating of each mine bears to the total rating of all the mines in the field; that is, if a mine should have a rating of 1,000 tons and the appellees should have commercial equipment capable of transporting only fifty per cent. of the total rating of all the mines, the particular mine would receive equipment for fifty per cent. of its rating, or 500 tons.

Up to this point there is no complaint as to this method. All mines interested in having their coal transported to market over the rails of appellees have received their equitable share of commercial equipment. The appellees, however, do not count as part of a mine's share of the commercial equipment, cars which they place at the mine tipple for the purpose of there receiving their own necessary fuel supply, and it is this which has given rise to this controversy. Cars for the purpose of receiving this railway fuel are, in the case of the appellee, the Alton Company, of such peculiar construction that they are not susceptible of use by any shipper or consignee upon that line, but are at all times restricted to the purpose of conveying the Alton Company's own fuel and are never used for commercial shipments. Appellee, the Illinois Central, segregates a portion of its ordinary coal cars for this purpose. All coal loaded

into these fuel cars of the appellees is purchased for the appellees' own use, and after the coal leaves the tipple of the mine no one, other than the appellees, has any title or interest in that commodity or in its subsequent movement, carriage, delivery, consumption or use (R. 501, p. 3); nor is there any consignor, consignee, freight or tariff, nor do the appellees compete as to this coal in any way with any shippers or consignees of commercial coal. (R. 501, p. 3.)

The Illinois Collieries Company, a mine not having a contract with these appellees for their own fuel, brought a complaint before the Interstate Commerce Commission upon the theory that the failure to count against the mine receiving it, as part of that mine's commercial equipment, the special cars placed at the tipple for coal destined for the appellees' own use was a discrimination in favor of the mine having the contract with the appellees and against the complainant in violation of Section 3 of the Interstate Commerce Act. The Commission heard testimony and arguments of counsel, and entered an order requiring these appellees to desist from their present practice of not counting cars for their own fuel coal, and requiring these appellees to put in force, and to maintain for the period of two years from the date of the order, a certain method of distribution of their cars.

The method laid down by the Commission, which these appellees were required, under penalty to maintain, provided that cars for the *appellees' own use* in hauling their own fuel should be counted as part of a mine's share of commercial equipment. That while a mine might sell all or any part of its tonnage to these appellees, it would not be entitled to receive any com-

mercial equipment from the amount available each day, if thereby it might *dispose* of more coal than a mine without such contract; in other words, to give concrete examples: A mine with a capacity of 1,000 tons at a period when there was a shortage of commercial equipment to the extent of fifty per cent., having a contract with these appellees for 250 tons per day would receive on that day commercial equipment capable of transporting 250 tons; if the contract with the appellees was for 500, 750 or 1,000 tons, it would receive NO commercial equipment.

Prior to the date at which this order was to go into effect the appellees, under the provision of Section 16 of the Interstate Commerce Act, brought their bills to restrain the enforcement of the Commission's order, and upon a hearing before three judges of the Circuit Court for the Seventh Circuit an injunction was granted against that part of the order of the Commission which had reference to the method of counting the appellees' own fuel cars. It is from the order granting this injunction that the Commission has appealed to this court, and the question involved in this case is the legality of the Commission's order as respects the appellees' own fuel cars.

CERTAIN QUESTIONS DISCUSSED IN APPELLANT'S BRIEF NOT ISSUES IN THIS CASE.

In the hearing before the Interstate Commerce Commission the question of distribution of the so-called private cars and the so-called foreign railway fuel cars was involved, and the Commission made its

order in respect thereto. Upon the hearing in the Circuit Court the questions were in the case, but not argued by counsel, and the Circuit Court in its opinion sustained in its entirety the Commission's order as far as private and foreign railway fuel cars were affected. These appellees have not taken an appeal from the decision of the lower court in sustaining the Commission's order in those respects, and no error has been assigned by appellant, the Interstate Commerce Commission, which can in any way be construed to raise in this court any question in regard to private or foreign railway fuel cars.

The practice of not counting private and foreign railway fuel cars against the mine receiving them has been in force without objection for many years. Operators, relying upon this practice, have invested large sums of money in equipment. The question of the validity of certain orders of the Commission affecting this practice is, we believe, now pending before this court in one or more cases. In justice to those litigants whose rights are so deeply involved, it is not proper that there be a discussion or a decision upon a question, which as far as this record is concerned, is purely academic. As counsel for the Commission have taken care to state, not only in their brief, but even in the answers filed in the Circuit Court, the present counsel for the appellees conceded, *for the purposes of that case* then being argued before the Commission that the foreign railway fuel cars and private cars should be counted. This statement was made by present counsel as an expression of their individual private opinion in fairness to the body before whom they were then arguing, and with a view to the use-

lessness of discussing a subject upon which that body had already formally passed (*Railway Commission of Ohio* v. *Hocking Valley Ry. Co.*, 12 I. C. R., 398.) In the light of this admission which the Commission have first introduced into the record for the purpose of foreclosing a reply by these appellees, we might question the fairness of counsel in devoting one-third of their brief to the discussion of a rule relating to the counting of private and foreign railway fuel cars and thus seeking to have this court determine a question affecting the rights of other litigants and not involved in this case. Foreign railway and private fuel cars are not in this record; and a discussion of the same is not essential to an understanding of the Commission's order as respects the appellees' own fuel cars.

Counsel for the Commission under heading 1f (pages 52 to 64 of their brief) raise a jurisdictional question. Prior to the filing of bills in these cases the appellee, the Illinois Central, was made defendant in a bill to restrain the railroad company from counting private and foreign railway fuel cars. The appellee, the Illinois Central, in its bill in these present cases set out the preliminary injunction granted against it, but before a decision of these cases the preliminary injunction was dissolved and no appeal was taken therefrom. No error has been here assigned and the question discussed by counsel is therefore not in this record.

THE ISSUES UNDER THE ERRORS ASSIGNED.

We shall here discuss briefly the various errors assigned by the Commission in its appeal to this court:

> "1. Said court erred in not dismissing the bill of complaint for want of equity.
>
> 2. Said court erred in not dismissing said bill because there is no allegation therein that irreparable injury will result from the failure to enjoin the enforcement of the order in question and no facts are alleged showing, or tending to show, that such injury will or can result therefrom."

The Interstate Commerce Commission being a body created by law, has only the power granted to it by statute, and if it seeks to enter an order which is not justified by the Interstate Commerce Act, such order is unlawful. It is not necessary to show irreparable injury, nor should the bill be dismissed for want of equity, if the order sought to be enforced by the Commission is in any respect beyond the jurisdiction of that body.

> "3. Said court erred in not dismissing said bill because there is not set forth therein, or made a part thereof as an exhibit, the report and opinion of the Commission stating the grounds upon which it based the order in question."

We are at a loss to understand what is the basis of this assignment of error, nor do counsel for the Commission in their brief aid us in this respect. We may assume, therefore, that assignment number 3 is waived.

> "4. Said court erred in not dismissing said bill on the allegations and denials of the answer of the Interstate Commerce Commission, and particularly the allegations marked 'a,' 'b,' 'c,' 'd,' 'e,' 'f' and 'g,' in paragraph XIV of said answer."

The error here assigned raises the question as to whether or not the discrimination alleged in paragraph XIV will justify the Commission in making the order against which the Circuit Court issued the injunction. It is obvious that even if the discriminations alleged in that paragraph are true and are prohibited by the Interstate Commerce Act, still the bill of these appellees should not have been dismissed if the Commission's order was *in any respect* unlawful.

> "5. Said court erred in holding that the complainant was 'entitled to an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands it to count its own cars that are being employed in hauling its own fuel as available commercial equipment.'"
>
> "6. Said court erred in granting an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands the Chicago & Alton Railroad Company 'to count its own cars that are being employed by it in hauling its own fuel as available commercial equipment.'"

The errors here assigned are the holding of the Circuit Court and the issuance of the injunction against the Commission's order which compelled the appellees "to count its own cars that are being employed by it in hauling its own fuel as *available commercial equipment.*" The reason is not apparent why counsel for the Commission claim that appellees' own fuel cars should be counted as part of the "available commercial equipment," when (R. 501, p. 20) "defendant admits that cars for complainants' own fuel supply do not constitute a part of complainants' available equipment for commercial shipments." With the ad-

mission in the record and in the briefs of counsel, that cars for the appellees' own fuel do not and cannot constitute available commercial equipment, assignments of error 5 and 6 do not raise any question of error in the issuance of the injunction in this case.

There is only one question upon this record, and it is this question to which we confine ourselves:

IS THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ESTABLISHING A METHOD TO BE PURSUED IN THE FUTURE BY THESE APPELLEES RELATIVE TO CARS USED FOR THEIR OWN FUEL, WITHIN THE POWER OF THAT COMMISSION?

The original bills brought by these appellees in the Circuit Court were based upon Section 16 of the Interstate Commerce Act.

> "The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul or suspend any order or requirement of the Commission shall be in the district * * * and jurisdiction to hear and determine such suits is hereby vested in such courts. * * *"

If the order is *in any respect* beyond the power of the Interstate Commerce Commission, the bill should not have been dismissed for want of equity, no irreparable injury need be alleged, and no allegation of the answer would justify a dismissal of the bill.

BRIEF.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ESTABLISHING A METHOD TO BE PURSUED IN THE FUTURE BY THE APPELLEES RELATIVE TO THE CARS USED FOR THEIR OWN FUEL SUPPLY IS BEYOND THE POWER OF THAT COMMISSION.

I.

THE COMMISSION'S RULE OF DISTRIBUTION IS NOT A REGULATION OF INTERSTATE COMMERCE.

Interstate Commerce Commission v. *Chicago Great Western Railway Co.*, 209 U. S., 108.

Express Cases, 117 U. S., 1.

Atchison, Topeka & Santa Fe R. R. Co. v. *Denver & New Orleans R. R. Co.*, 110 U. S., 667.

Donovan v. *Pennsylvania Company*, 199 U. S., 279.

Central Stock Yards Company v. *Louisville & Nashville Ry. Co.*, 192 U. S., 568.

East and West India Dock Co. v. *Shaw et al.*, Law. Reports, 39 Chancery Division, 524.

West and others v. *London & Northwestern Ry. Co.*, Law. Reports, 5 Common Pleas, 622.

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S., 197.

Interstate Commerce Commission v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263.

Adair v. *United States*, 208 U. S., 161.

II.

SECTION 15 OF THE INTERSTATE COMMERCE ACT DOES NOT EMPOWER THE INTERSTATE COMMERCE COMMISSION TO MAKE THE ORDER ENJOINED.

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S., 184.

Interstate Commerce Commission v. *C. N. O. & T. P. Ry. Co.*, 167 U. S., 479.

III.

THE ORDER IS A TAKING OF PRIVATE PROPERTY PROHIBITED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Missouri Pacific Ry. Co. v. *Nebraska*, 164 U. S., 403.

ARGUMENT.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ESTABLISHING A METHOD TO BE PURSUED IN THE FUTURE BY THE APPELLEES RELATIVE TO THE CARS USED FOR THEIR OWN FUEL SUPPLY IS BEYOND THE POWER OF THAT COMMISSION.

I.

THE COMMISSION'S RULE OF DISTRIBUTION IS NOT A REGULATION OF INTERSTATE COMMERCE.

The Interstate Commerce Commission has by its order sought to establish a method of counting the cars used exclusively for the carriers' own fuel, and entered an order by which these appellees were prohibited for a period of two years from using any other method of coal car distribution than that established by the Commission's order.

Under an appeal from an injunction against the enforcement of that order, the question here for discussion is not whether the plan of distribution heretofore employed by these appellees is fair and equitable, but whether the Commission's *plan* is within the power of that body to establish.

It becomes necessary therefore to consider in detail the facts alleged in the bill and admitted in the answer, which directly involve the nature of the transaction on the part of the appellees in regard to the use of cars for their own fuel supply, and the discriminations that it is admitted result from the practice of not counting the appellees' own fuel cars.

It is charged in the bills and admitted in the answers (Rec. 501, pp. 3-16):

> "That all fuel coal for the use of your orator is purchased by your orator at the mines and delivered by the mines to your orator at the mine tipple into your orator's cars or locomotive tenders; that all of said coal purchased as aforesaid is consumed by your orator in the necessary operation of its own railroad; that the mines supplying such fuel coal have no title or interest in said coal after it leaves the mine tipple; that no freight is assessed upon said coal; that no person, company, firm, corporation, or locality, with the sole exception of your orator, has any right, title or interest of any sort, after said coal has been delivered to your orator at the mine tipple as aforesaid, in the subsequent movement, carriage, delivery, consumption, or use of such coal by your orator; that your orator is not engaged in the purchase and transportation of coal for the purpose of selling the same to any person or of competing in any way with any shippers or consignees of commercial coal."

It is also charged in the bill (Rec. 501, p. 2):

> "Your orator further avers that it is necessary for your orator to have at all times a sure and certain supply of fuel for its own needs; that, without such certain supply of fuel, your orator would not be able to move its trains and operate its railroad in accordance with its charter duties to the public; that your orator has purchased and now operates on its line 360 steel, hopper-bottom coal cars; that said cars are of an extreme height, to-wit, ten feet; that, by reason of such height, said cars can be unloaded only upon special constructed trestles; that no consignees to whom coal is shipped from mines on your orator's line own or have the use of such trestles, and that such cars are not available for commercial shipment of coal. And your orator avers that it at all times re-

> stricts these cars to the service of hauling your orator's own fuel supply, and that by reason of such restriction and by reason of the fact that your orator alone has the means of unloading said hopper-bottom cars, said cars never constitute a part of your orator's equipment available for commercial shipments of coal."

It is admitted by the appellant that these cars are restricted to the business of hauling the company's own fuel, and cannot and do not constitute equipment which is available to the appellee, the Alton Company, for the use of commercial shipments of coal.

We have then, this situation: cars which cannot and do not constitute a part of the appellees' "instrumentalities and facilities of shipment or carriage," and a transaction in regard to these cars which begins and ends at the tipple of the mine, and at no time involves either an instrumentality of commerce, or commerce itself.

As Judge Baker concisely puts it (Rec. 501, p. 54):

> "Coal is brought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.
>
> Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicles transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast."

The Interstate Commerce Commission has alleged in its answer that the failure to count the appellees' own fuel cars against the mine receiving them results in undue and unreasonable preference in the following respects (Rec., 501, p. 20):

The operator having a contract with the appellees for their fuel (a) receives more cars; (b) operates his mine to a fuller capacity and reduces the cost of coal per ton; (c) develops his mine more rapidly and increases his capacity; (d) keeps a more efficient working force; (g) is enabled to make long contracts for the delivery of coal. While the mine that does not receive these cars (e) is retarded in inverse ratio as other mines advance. On the other hand by means of the noncounting of these cars (f) the appellees are enabled to secure low prices on railway fuel. It is then alleged more specifically (Rec. 501, p. 21) that the mines receiving the cars for the appellees' own fuel are able to produce their coal at from five to twenty cents per ton less, and the appellees are enabled to purchase their coal at a reduced price.

A review of the particulars which it is alleged constitute the discrimination discloses the fact that by reason of the noncounting of cars for the appellees' own fuel supply, certain mines having contracts with the appellees are enabled to operate their mine more nearly to a full capacity and thus produce and sell coal cheaper to the appellees or to the public. It is nowhere even suggested that the failure to count these particular cars permits a mine to have its coal *transported* at a less price or in greater quantities. There is in this case no inference of any discrimination in

regard to coal which the appellees, as common carriers, transport over their rails.

Keeping in view the fact that the cars for the appellees' own use cannot and do not constitute instrumentalities or facilities of transportation; that the coal is purchased and delivered at the mine tipple and never enters into commerce; and that the discrimination resulting from the failure to count these cars in no wise affects the relation between these appellees, as common carriers, and the mines, as shippers of a commodity in commerce; with all these in mind the order of the Commission and the results that flow from that order should now be considered.

Insofar as the appellees' own fuel cars are involved, the order is as follows (R. 501, p. 5):

> "It is further ordered that said defendants be, and they severally are, hereby notified and required to establish, on or before said first day of July, 1908, and during a period of at least two years thereafter, to maintain and enforce a practice of regulation taking into consideration cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines, for or as effecting interstate shipments of coal; and if the number of carrier's own fuel cars is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the carrier's own fuel cars assigned to it and a sufficient number of system cars to make up its proportion; but if the number of the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimina-

> tion of the mine or mines to which the carrier's own fuel cars have been assigned; that is, the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of carrier's own fuel cars is less than its proportion of the total of available cars, including carrier's own fuel cars."

In order to illustrate the exact effect of this order, we submit the following examples of the result to the mine and to the appellees under various conditions. As a basis of comparison we take two mines having a daily rating of one thousand tons each and a shortage of cars for commercial shipments to the extent of fifty per cent. If neither mine had a contract with the appellees for their necessary fuel, each will receive equipment for transportation in commerce of five hundred tons of coal. Let us suppose, however, that the X mine enters into no contracts with the appellees, its share of the commercial equipment of the appellees remains constantly sufficient for the transportation in commerce of five hundred tons of coal. If the Y mine, however, has a contract for five hundred tons with the appellees it will receive no equipment for commercial purposes, and will be prevented by the Commission's order from using the facilities of the carrier for the transportation in commerce of a single ton of coal. No relation of shipper and common carrier will then arise between the appellees and the Y mine, appellees will earn no freight, and no commodity will move from that mine in interstate commerce. If the X mine, having no contract with the appellees, is enabled to dispose of five hundred tons locally and the Y mine to dispose

of five hundred tons to the appellees, under the Commission's order the X mine will still receive commercial equipment of the appellees for the transportation in commerce of 500 tons while the Y mine will receive no such equipment. The X mine will have conveyed to market five hundred tons and the appellees will earn freight thereon, but the Y mine will have no coal conveyed to market and no freight will be earned by the appellees. *Instead of placing the mine operators upon the equality so urgently insisted upon in appellant's brief, the order of the Commission works a discrimination against a mine which chooses to sell to the appellees, rather than elsewhere.*

Cars for the appellees' own fuel do not and cannot constitute instrumentalities and facilities of shipment. There is no commerce in the coal for the appellees' own use. There is no discrimination by the appellees in their capacities as common carriers of freight tendered for shipment. Yet the Interstate Commerce Commission, with the idea of preventing discrimination of any character by any corporation organized as a common carrier, has required these appellees to put in force and maintain for a period of two years a method of car distribution which will deprive a mine under certain conditions of all right to have its commodity carried in commerce by these appellees. We submit that this order is based upon the mistaken assumption of the Commission that a carrier is prohibited from *any* discrimination and that it is within the power of the Commission to establish a method of conducting the carriers' *private* business in the future so that all mines may be placed upon an equality, not as *shippers,* but as *producers* of coal.

There is a valid distinction between discrimination by the appellees as common carriers whereby a shipper is permitted to have more goods transported or at a less rate, and a discrimination whereby one individual is permitted to make a greater profit than another in the sale of an article. The Commission in its order attempts to regulate the *latter,* and in so doing exceeds its powers. As this court said in the recent case of *Interstate Commerce Commission* v. *Chicago Great Western,* 209 U. S., 108, at page 118:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

The principal of the separation between the duty that a carrier owes to the shipping public and its right to manage its important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits, has been recognized in many cases in this court.

In the *Express Cases,* 117 U. S., 1, it was held that a carrier might discriminate in favor of one express company and against another.

A railroad company may establish a station for the especial accommodation of a particular customer and refuse to establish a like station elsewhere for the especial accommodation of another.

Railroad Co. v. *Railroad Co.,* 110 U. S., 667.

In *Donovan* v. *Pennsylvania Company,* 199 U. S., 279, it was claimed that it was a discrimination for the

railroad company to favor by contract one bus company against another. In disposing of this contention, the court said (p. 296):

> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmalee Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmalee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling."

The case of the *Central Stock Yards Company* v. *Louisville & Nashville Ry. Co.,* 192 U. S., 568, is very similar to the case at bar. The railway had selected one stock yards as its depot in Louisville, and refused to deliver at another. It was claimed that this was a violation of Section 3 of the Interstate Commerce Act. The court held that the arbitrary selection of one yard over the other was not a discrimination prohibited by the Act. In that case the distinction between a discrimination of a carrier in its public capacity and one in its private capacity is most clearly illustrated. The failure to deliver at the second stock yards at Louisville prevented a consignee from receiving freight upon equal terms. In that case the person claiming the discrimination had traffic relations with the carrier, just as the mine

without a fuel contract ships over the appellees' lines, but in each case the discrimination is made by the railroad in its private capacity as a corporation, and, as the court says in the Great-Western case, *supra:*

> "Yet in no proper sense is the public a general manager."

In the case of *East & West India Dock Company* v. *Shaw et al.*, Law Reports, 39 Chancery Division, 524, the Dock Company, which was a railway within the Railway and Canal Traffic Act of 1854, had discriminated against the defendants in charges for the use of a certain dock unconnected with the railway. The Railway Commissioners passing upon Section 2 of the Railway and Canal Traffic Act of 1854, which is substantially similar to Section 3 of our Interstate Commerce Act, held that since traffic—the relation between a common carrier and a shipper—was not involved, there was no discrimination prohibited by that section.

In *West and others* v. *London & Northwestern Ry. Co.*, Law. Reports, 5 Common Pleas, 622, a railroad company had leased all of its wharf at a certain station to one consignee, for the purpose of stacking coal until sold. Other consignees were prevented thereby from receiving coal at that station. In dismissing the application to prevent this discrimination, the court said:

> "It is said that the company, by letting their wharf to Mr. Perkins for the above purposes, give him an advantage in the sale of his coal over the applicants. But this is not an advantage in the conveyance or transport of the coal; and if it is not one of the advantages within the Act, the fact that it is an advantage to him and disadvantage

> to others becomes immaterial, and cannot give the court jurisdiction. It seems to us that, if we were to extend our jurisdiction to things beyond those which relate to the conveyance of traffic and the matters incidental to its transport we should exceed the authority conferred upon us by the Act, and might then be asked to extend our interference to various matters not at all contemplated by it,—such as, the arrangements respecting refreshment rooms, book-stalls, and other like matters. * * *"

Section 3 of the Interstate Commerce Act was taken directly from Section 2 of the English Act.

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission,* 162 U. S., 197.

And as this court said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.,* 145 U. S., 263 (page 284):

> "These traffic acts (referring to the English act) do not appear to be as comprehensive as our own and may justify contracts which with us would be obnoxious to the long and short haul clause of the act or would be open to the charge of unjust discrimination, but so far as relates to the question of 'undue preference' it may be presumed that Congress in adopting the language of the English act, had in mind the construction given to those words by the English courts and intended to incorporate them in the statute. *McDonald* v. *Hovey,* 110 U. S., 619."

It is clear, therefore, that there is this distinction between the public or traffic relation of the appellees and their relation as a private corporation purchasing coal for their own use. The Commission by its order regulates the private relation.

The Commission, however, is a body created by Congress, and its powers and jurisdiction must be

found within the limit of the act of its creation. That act is known as the Interstate Commerce Act, and as Mr. Justice Shiras says in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S., 197, page 211:

> "The scope or purpose of the act is, as declared in its title, *to regulate commerce.*"

It is only when commerce or the instrumentalities of commerce are involved that the Interstate Commerce Commission has power to act at all, and all orders of that body must be made with the one idea of *regulating commerce.*

> "It is also obvious that if the Commission does have the power of its own motion to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute."
>
> *Texas & Pacific Ry. Co.* v. *I. C. C., supra* (page 216).

The order in this case, however, has no such connection with interstate commerce. The appellees are required to count as part of their equipment available for commercial shipments cars which it is admitted can not and do not constitute instrumentalities or facilities of shipment or carriage, and are obliged to follow for a period of two years a certain method of distribution so as to place all mines upon an equal *producing* capacity, even though the method formerly pursued did not permit one mine to have any advantage in *traffic* relations with the appellees and the new method promulgated by the Commission under certain conditions works a discrimination in this *traffic* rela-

tion. To hold that the appellees must so act in the distribution of its private instrumentalities on their tracks that where no traffic is involved all persons who may be located upon their rails shall have equal opportunities of profit is to place in the Commission power without limit and having no connection with interstate commerce.

A regulation to be within the competency even of the Congress must have some real or substantial relation to or connection with the commerce regulated.

Adair v. *United States,* 208 U. S., 161.

Yet the Interstate Commerce Commission, which must confine itself within the act of its creation—*the regulation of commerce*—in its order not only restrains a practice which involved no discrimination in the appellees' traffic relation with the mines, but establishes a *new method* regulating the appellees in their *private* capacity as purchasers of coal upon the theory that any other plan than the one devised by the Commission is unlawful.

II.

SECTION 15 OF THE INTERSTATE COMMERCE ACT DOES NOT EMPOWER THE INTERSTATE COMMERCE COMMISSION TO MAKE THE ORDER ENJOINED.

Prior to the decision of this court in the *Social Circle* cases, 162 U. S., 184, the Interstate Commerce Commission had assumed that the Interstate Commerce Act gave the Commission authority not only to say that a rate was excessive, but to establish a new rate to be observed by the carrier in the future. Ever since

the case of *Interstate Commerce Commission* v. *Railway Company*, 167 U. S., 479, finally settled the question against the claim of the Commission there has been agitation by that body and by the public at large for specific power in the Commission to *fix rates*. This agitation finally culminated in the passage in 1906 of the Hepburn Amendment, known in Congress, in the newspapers and in fact to every one as the ***Rate Bill***. It is upon the "rate making" section of that bill that the Commission has sought to found its authority to establish the practice questioned in these cases.

Section 15, the one upon which the Commission has based its order is, so far as material here, as follows:

> "*That the Commission is authorized and empowered*, and it shall be its duty, *whenever*, after full hearing upon a complaint made as provided in Section 13 of this Act, or upon complaint of any common carrier, *it shall be of the opinion that any of the rates*, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, *for the transportation of persons or property* as defined in the first section of this Act, *or that any regulations or practices* whatsoever of such carrier or carriers *affecting such rates are unjust* or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, *to determine and prescribe what will be the just and reasonable rate* or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; *and what regulation or practice in respect to such transportation is just*, fair, and reasonable *to be thereafter followed;* and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not

thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

It is obvious that by this section the Interstate Commerce Commission is given power, when it is of the opinion (1) that a *rate* is unreasonable, or (2) that a regulation or practice *affecting such rate* is unreasonable, to establish a reasonable rate or a reasonable practice affecting such rate. The slight change in the phraseology which permits the Commission to determine "what regulation or practice in respect to *such transportation* is just, etc.," is immaterial for the reason that the Commission must first find that a practice *affecting such rate* is unreasonable before it may establish a new practice, and because "practice in respect to such transportation" naturally refers to "rates * * * for the transportation of persons or property," which immediately precedes it in the sentence. The authority to establish a rate and a practice affecting that rate naturally go together, for the mere lowering of a rate, if the carrier could bring its remuneration back to the same level by increasing, say the icing charge, would be of no benefit to the public.

It is therefore impossible, without violence to the purpose and language of the Hepburn Amendment, to so construe Section 15 as to give the Commission power to establish a practice unless it be a practice affecting rates. By its order, however, the Interstate Commerce Commission has established, and required the appellees under penalty to maintain, a method of

counting empty coal cars, cars which do not and can not constitute instrumentalities or facilities of carriage, and which never enter into commerce.

A rate may be defined as a price charged and collected for transporting a given unit of a given commodity to a given point. Can it be argued that the practice of not counting a car placed at the tipple for the appellee's own use, where there is no shipper, no consignee, no tariff, no freight, no commerce,—that such a practice is a practice affecting the *price* of transporting a given unit of a commodity? Is the rate on a ton of coal from Springfield to Chicago increased or diminished or *affected* by the practice of not counting a special fuel car against a mine? Does any shipper, by reason of this practice, pay a greater or less or different price per ton for the transportation of his coal?

We do not here urge that an unlawful practice of a carrier which is discriminatory may not be prevented by appropriate action by the Commission or the courts. But we again repeat: The only question in this record is the legality of the *practice established by the order* of the Interstate Commerce Commission, and from which practice these appellees were forbidden for a period of two years from deviating a hair's breadth. We are not concerned now with discrimination, for the appellant has staked, as it necessarily must, its entire case upon the authority supposed to have been conferred by Section 15. (Rec., 501, p. 15.) Without this power its appeal must fail, and since the non-counting of empty cars or locomotive tenders is not a practice *affecting rates*, no authority for establishing a definite practice to be followed in the future exists in the Interstate Commerce Commission.

III.

THE ORDER IS A TAKING OF PRIVATE PROPERTY PROHIBITED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellees have purchased at large expense and now own cars for the transportation of commercial coal. These cars are the private property of the appellees and they may mortgage, lease or sell them. In fact the appellees' ownership over these cars does not differ in any way from their ownership of their station grounds, tracks or right of way; all these the appellees hold as their private property but for the public use, for which they are incorporated. The order of the Interstate Commerce Commission in effect says that for two years the appellees shall permit the mines located along their rails to use cars which are the private property of the appellees, in accordance with certain terms and conditions proposed in that order, which is not assented to by the appellees. A concrete example will best serve to illustrate the effect of the Commission's order. There are two mines on the line of the appellee, the Alton Company, each with a rating of 1,000 tons per day, and the Alton Company has commercial coal cars capable of transporting only 500 tons. One mine has a contract to supply 500 tons of coal for the Alton's own use, for which the special fuel cars of that road are placed at the mine tipple. Under the Commissioner's order the Alton must permit the mine without the fuel contract to use the entire commercial car supply and must deny the other mine any use of that equipment. In other

words, to prevent discrimination, the appellees must permit one mine to use all their commercial cars to the exclusion of the other mine and against the will of the appellees, that is the order takes the property right of the appellees in these cars and their distribution, so as to equalize the two mines. It is this that constitutes the taking of private property, which is prohibited by the fifth amendment to the Constitution.

The exactly identical question arose in *Missouri Pacific Railway Company* v. *Nebraska,* 164 U. S., 403. In that case the railway had leased portions of its right of way to two elevator companies and denied a similar right to a third elevator company. The third elevator company could not ship grain over the railway without access to the right of way. Upon the theory that it was discrimination to grant the use of portions of the right of way to the two elevators and to deny equal privileges to the third; the state Railway Commission ordered the railway company to make a lease of a portion of its right of way to the third elevator, upon the same terms as to the others. Note the identity of the facts in that case with the facts in the case at bar. In both cases there is an existing discrimination against a member of the public who desires to ship over the line of the carrier, in the one case an elevator, in the other a mine. In each case there is involved the property of the carrier which is private but held for a public use; in the one, right of way, in the other cars; and finally there is an order of a commission which requires the use of that property in a certain way to prevent future discriminations. In the Nebraska case this court said (page 414):

"A railroad corporation doubtless holds its station grounds, tracks and right of way as its private property, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad* v. *Richardson,* 91 U. S., 454. But how far the railroad company can be compelled to do so, against its will, is a wholly different question."

* * * * *

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

It is true that the Nebraska case involved the violation of the Fourteenth Amendment and this case a violation of the Fifth. The principle, however, is identical, and the Fifth Amendment, in as far as the taking of private property is concerned, restrains the federal government, or any body acting under its authority, in the same way that the Fourteenth Amendment restrains the state or bodies of its creation.

If it is a taking of property for the Nebraska Railway Commission to require the leasing of right of way

owned by a railroad for the use of the public, it is a taking of property for the Interstate Commerce Commission to require in the future the allotment of the appellees' cars to a certain mine. As in the Nebraska case the question as to whether or not the Commission might not compel the railroads to cease from giving privileges to one shipper over another is not involved. The sole question is whether the appellees can be compelled against their will to so dispose of their property *in the future* as to *prevent* discrimination, which as this court says in the Nebraska case, is a wholly different matter. There may be discrimination in this case as there was in the Nebraska case. Such discrimination may be illegal. But no discrimination will justify the Interstate Commerce Commission in taking private property to EQUALIZE conditions and thus destroy the discrimination. And it is this its present order attempts to do.

The greater part of appellant's argument is devoted to the discussion of questions foreign to this case. Pages 33 to 51, inclusive, are the only part of the argument relating to the real question at issue, to wit, the action of the Circuit Court in enjoining that part of the Commission's order requiring the appellees in their rule of distribution of cars to count against the mine cars used for the appellees' own fuel. The argument of counsel for appellant on this question is fundamentally unsound, and this will appear from a few quotations therefrom. On page 33 in discussing the advantages resulting to a mine holding a contract for the supply of company fuel coal, it is stated:

> "To illustrate this advantage, if a mine has a capacity of 1,000 tons per day and is supplying 250 tons of company fuel, with a 50 per cent. car supply this mine would ship 500 tons of commercial coal and 250 tons of company fuel. A mine of equal capacity without the company fuel cars would ship 500 tons."

Also on page 47 it is stated:

> "It has been the general practice of railroad companies to allot company fuel cars in addition to distributive shares in the general distribution."

Again on page 49 it is stated:

> "It is the act of the carrier, in the performance of its public duty, in allotting cars in addition to distributive shares under the general distribution, that results in the descrimination."

It will be noted from these references to appellant's argument that it is based upon the theory that the coal taken by the railroad at the mine tipple is *shipped;*

That the cars placed by the company at the mine for transporting its own coal are *allotted* to the mine;

That such cars are a part of the *facilities* of a railroad company to which the public through the shipper is entitled to a *pro rata* division in the times of car shortage;

That such cars are used in *commerce.*

None of these assumptions or theories is correct. The coal taken by the appellees at the mine tipple becomes their property before there is any movement of the same in cars or other instrumentalities. This does not constitute a *shipment.* It is only the commercial coal that is shipped. It is true that cars are placed at the mine by the appellees to receive their necessary fuel which has been purchased from the mine, and the same is then taken in the appellees' special cars to the place where it is desired to use coal in the necessary operation of the road, but there is no shipper, no consignee, no freight and no shipment.

Further, the appellees do not *allot* company fuel cars to any mine. It is true they do not count them against the percentages of the mines because they are not a part of the available commercial equipment. Would it be contended that the appellees were under obligations to count as against the mine, tenders of engines which sometimes receive the coal direct at the tipple (Rec. 501, p. 3), or to count wheelbarrows or any other conveyance, if perchance instead of buying cars especially constructed as in the Alton case, they should invest their money in such wheelbarrows or other conveyances. What particular divinity is there that surrounds a car? Why, because they are called cars in-

stead of tenders or wheelbarrows or any other instrumentalities, must a different rule apply? The only justification would be that the same were a part of the general commercial equipment of the railroad; but as it is conceded by counsel in his argument that they do not constitute a part of such available commercial equipment, then the reason for any distinction fails.

The companies merely use their special fuel cars in hauling their own fuel from the place of business, to wit, the mine. These cars are not allotted and they are not a part of any "distributive share" available in the "general distribution."

On page 38 of appellant's argument reference is made to the Logan case reported in 154 Fed., 497, in which the court says:

> "The cars must be *pro-rated* so as to give each and every shipper his proportionate share of facilities to which he is entitled."

True; he is *entitled* however to a share of the facilities *used in transportation*. He is not entitled to a share of the right of way of the appellees, to a share of their offices, to a share of their orders for ballast, rails, ties, stationery, &c., and the cars of the appellees used only for the purpose of transporting their own fuel are just as much a part of the private facilities of the appellees as are rails, ties, ballast, desks, stationery, etc.

On page 35 counsel says:

> "The order of the Commission and the judgment of the Circuit Court recognize that there is an advantage from the failure to charge or consider the company fuel cars."

It is of course true that there is an advantage, as heretofore discussed, to a mine having a fuel contract, and the question of cars is one incidental to the advantage of the contract. There is the same kind of an advantage that there is to any mine in having a contract for local consumption or a large contract with any buyer that enables the mine to develop a steady output and keep its working force intact. The advantage however to the mine is because of the contract and is the same advantage that would ensue to a manufacturer of rails or to a producer of ties or ballast in having a large contract by which rails or ties could be produced with less expense than by one who did not have such contract. The wholesale price is always less than the retail one and such advantages are natural business advantages arising from a legitimate transaction—advantages arising by the exercise of the legitimate right of business contract by the appellees in their private capacity as corporations.

On page 51 counsel raise the rather novel proposition that by the method practiced by the appellees as to car distribution they might consign cars ostensibly to be loaded with coal for their own use and then divert the coal thus loaded to other uses, resulting in fraud. No such claim is made in the answer filed, and certainly fraud will not be presumed. It may be true that fraud might arise out of the wrongful use of a perfectly honest and fair practice, but that would hardly be sufficient to require the establishment of an entirely new practice.

In the case of *United States* v. *D. & H. Co.*, 164 Fed., 215, on page 245, Judge Gray, in discussing the

commodity clause of the Interstate Commerce Act and in relation to justifying said portion of the act by the assumption that the carrier who transports its own coal as well as that of others must discriminate, says:—

> "It could hardly be more unreasonable to forbid the burning of coal on the locomotives, and compel a resort to wood for fuel, because the carriage and distribution of such coal might furnish the opportunity for the attempt to discriminate in freight rates, as to the coal necessarily remaining after the preparation of coal for their own steam purposes."

The question of fraud, however, is not in this case, and the trial and argument have proceeded purely upon the theory that the appellees are acting in good faith in their use of cars or other instrumentalities in hauling coal for their own uses and purposes. If at any time a case should arise of the fraudulent use of such cars or the use for one purpose when ostensibly they were for another, it would present a very serious question to be dealt with by the courts upon a proper case. Counsel is entirely within the realm of imagination in presenting such question in this hearing.

> "Because opportunities for the violation of the act may occur by reason of the rule is no ground for holding as a matter of law that violations must occur and that the rule itself is therefore illegal."
>
> *Southern Pacific* v. *Interstate Commerce Commission*, 200 U. S., 536, p. 556.

While as heretofore stated in the argument, the question of the rule as to private cars is not in this rec-

ord, counsel for appellant in argument refer to the principle applicable to the counting of private cars as applying alike to the company fuel cars, and on page 48 states: "It is the settled judicial conclusion that private cars shall be charged, although restricted to the use of the mines to which they are consigned," and further, "company fuel cars like private cars are not available for general distribution."

We do not understand it to be the settled judicial conclusion tnat private cars shall be charged against a mine. The question is one now before this court in other cases, and there is much to be said on both sides of the proposition. It is true that private cars are not strictly available for general distribution, but at the same time it may be entirely proper while they are in use on a railroad company's line that they should be considered a part of its available commercial equipment in any method of car distribution. The situation, however, as to private cars is so dissimilar from that of company fuel cars that the principle applicable to one has no relationship to the other. We merely suggest that the one is moved under a tariff, the other is not. Upon one the appellees receive freight, upon the other they do not. As to the one there is a consignor and consignee, as to the other there is neither. One is used in transporting a commodity in commerce, the other is not. One produces a revenue to the appellees, the other does not. One is an instrumentality of shipment, the other is not.

DIVISION IV OF APPELLANT'S ARGUMENT.

It is not clear how division IV of appellant's argument is applicable to the present case. The argument might be in point were there any dispute as to the facts, but there is not. The facts appear from the bill and answer. There is no question of preponderance of evidence or any presumption arising under the evidence. The only question before the court is whether or not under the undisputed facts as appear by the bills and answers the correct legal conclusions were drawn and also whether there is any jurisdiction on the part of the Commission to make the order. There is no presumption as to the correctness of the legal conclusions of the Commission. The order of the Commission is unreasonable as a matter of law. The Commission is without jurisdiction as a matter of law to make such an order. It may be conceded that discrimination appears as a fact, but whether such discrimination is prohibited by the act, or is a mere discrimination arising out of the private business of the companies, is a question of law.

In the case of *Stickney et al.* v. *Interstate Commerce Comm.*, 164 Fed. Rep., 638, on page 643, Judge Adams, referring to the same question, lays down the proper rule:

> "Being a commission of the character mentioned, we at least perceive no reason for giving its proceedings and conclusions greater efficacy than is accorded to those of quasi judicial bodies, created to perform duties involving inquiry into facts and application of law thereto. The finding of facts on controverted and conflicting evidence by such bodies when not brought about by fraud or mistake is generally conclusive, and ought not to be disturbed by

the courts; but when facts found, conceded or established without dispute admit of but one legal conclusion and a different and erroneous one is reached by reason of a misconception and misapplication of law by such bodies, their action is subject to review and may and ought to be avoided by the courts. *James* v. *Germania Iron Co.*, 46 C. C. A., 476, 107 Fed., 597. *Johnson* v. *Towsley*, 13 Wall., 72; *Moore* v. *Robbins*, 96 U. S., 530.

We refrain from expressing any opinion concerning what other jurisdiction, if any, is conferred upon this court by the broad and comprehensive language of the Hepburn Act authorizing it 'to enjoin, set aside, annul or suspend any order or requirement of the Commission.' All we are required now to hold and all we do hold is that this court has ample jurisdiction to set aside or suspend any order of the Commission resulting from a misconception and misapplication of a law to conceded or undisputed facts."

Under the Hepburn Act the courts are given the power to set aside, annul or suspend any order or requirement of the Commission. If division IV of appellant's argument is applicable, then it is an argument against any power in the courts to deal with an order of the Commission where the facts are not in dispute. The order of the Commission enjoined was based on a misapplication of the law to undisputed facts, and the power of the court in such case is plain.

CONCLUSION.

The simplicity of the single question presented by this record is obvious. The facts are admitted. "Rating" is not an issue. Any method of distribution formerly used by these appellees is immaterial, for the right of the Commission to enjoin that method is not raised by assignment of error. Only one question is be-

fore this court. *Can the Interstate Commerce Commission establish an exact method of distributing cars for the appellees' own fuel supply, from which the appellees may not deviate in the minutest detail for a period of two years?* The case on this record is not the prohibition of a particualr practice claimed to be unlawful. It is not even similar to the establishment of a maximum rate, for then the carrier need only not exceed that rate. This order is a regulation in the future of the detailed operation of the appellees' private business; of the detailed use of the appellees' private property; of the private business relations in detail between a purchaser and seller of coal. The order of the Interstate Commerce Commission forced upon these appellees is an exacting system which instructs them how they must act under every condition that may arise. To be legal the system established by the order must be the only method which will prevent unlawful discrimination; must be a regulation of interstate commerce; must find its authority in Section 15 of the Act; and, finally, must not violate the private property clause of the Fifth Amendment to the Constitution. If the order fails in but *one* of these conditions, it is unlawful. It has failed in ALL. The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

GARRARD B. WINSTON,

Solicitor for The Chicago & Alton R. R. Co.

ROBERT MATHER,

F. S. WINSTON,

Of Counsel.

W. S. KENYON,

Solicitor for The Illinois Central R. R. Co.

J. M. DICKINSON,

Of Counsel.

APPENDIX.

Chicago & Alton Railroad Co. *vs.* Interstate Commerce Commission. } No. 29115. In Equity.

Illinois Central Railroad Co. *vs.* Interstate Commerce Commission. } No. 29116. In Equity.

(In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.)

OPINION.

"Before Grosscup, Baker and Kohlsaat, Circuit Judges.

"These causes are substantially alike and were submitted together for final decree upon the bill and answer.

"Complainants are interstate common carriers. Along the line of each in Illinois are mining districts, within which the operators are dependent upon one or the other of these carriers to get to market their product in excess of local consumption.

"Following are the classes of cars involved: (1) Coal cars owned by complainants and used by them in hauling coal for shippers generally; (2) private cars owned by coal mining companies or by their customers and used in conveying coal from the mines to the customers; (3) fuel cars owned by foreign railroads and used on complainants' roads in hauling coal from the mines to the delivery points for the foreign rail-

roads; (4) fuel cars owned by complainants and used by them in carrying coal from the mines to their own coal chutes. Complainants purchase no coal except for their own use.

"The greater part of the year there is more equipment at hand than there is coal to haul. But during the winter months a car shortage generally occurs. Prior to April 13, 1908, complainants were accustomed to deal with a shortage of coal cars in this way: They rated each mine according to the relation its average producing capacity bore to the average producing capacity of the district in which it was located, and they distributed to each mine its pro rate share of the available equipment of class one, above enumerated; but they did not count or in any way take into consideration the available equipment of classes two, three, and four.

"On April 13, 1908, the Interstate Commerce Commission, in a proceeding duly pending, made the following order: 'It is ordered that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby notified and required, on or before the first day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars, in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

" 'It is further ordered that said defendants be, and they severally are hereby, notified and required to establish on or before said first day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned must, be

given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars.'

"Complainants, contending that their method of distribution is right, ask to have the enforcement of the Commission's order enjoined.

"The Commission's report is found under the title of *Traer* v. *Chicago & Alton Rld. Co. et al.*, 13 I. C. C. Rep. 541. Other cases bearing upon the questions herein involved are *Ry. Com. of Ohio et al.* v. *Hocking Valley Ry. Co. et al.*, 12 I. C. C. Rep., 398; *U. S. ex rel. Pitcairn Coal Co.* v. *B. & O. Ry. Co.*, 154 Fed., 108; *Logan Coal Co.* v. *Pa. Ry. Co.*, 154 Fed., 497.

Baker, Circuit Judge, delivered the opinion of the court.

I. The so-called private cars.

A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of

the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is *pro tanto* void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

"It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers cannot be required to take into consideration the cars of shippers who do only an intrastate business.

"When Federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

II. Fuel cars of foreign railroads.

"The fact that these railroads are themselves common carriers has nothing to do with the case. Here

they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment.

III. Fuel cars of complainants.

"Coal is bought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

"Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel.

"But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate commerce law, not as

diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operators' local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine. And we perceive no just ground for a difference, if the mine's diminished capacity comes from the carrier's act. While the carrier's cars that are being employed in hauling its own fuel are not a part of the available commercial equipment, yet the diminished capacity of the mine to tender coal for transportation in commerce should be taken into consideration, and computing the average number of the carrier's own fuel cars set out at a mine may be the easiest and surest way of gauging that mine's diminished capacity.

"In our judgment, complainants are entitled to relief against that part of the order which requires them to count the so-called private cars and the fuel cars of foreign railroads as available commercial equipment. But they are each entitled to an injunction against the enforcement of that part of the order which

commands them to count their own cars that are being employed in hauling their own fuel as available commercial equipment, and against their being compelled to take such fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce.

"Decrees will be entered accordingly."

Office Supreme Court, U. S.
FILED.
FEB 25 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*
No. 232.

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*
No. 233.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

REPLY

TO BRIEF FILED ON BEHALF OF HORACE LOWRY, C. E. WALES AND J. L. D. SPEER, AS RECEIVERS OF THE ILLINOIS COLLIERIES COMPANY.

GARRARD B. WINSTON,
Solicitor for The Chicago & Alton R. R. Co.

ROBERT MATHER,
F. S. WINSTON,
Of Counsel.

W. S. KENYON,
Solicitor for The Illinois Central R. R. Co.

J. M. DICKINSON,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

INTERSTATE COMMERCE COMMISSION, *Appellant,* *vs.* THE CHICAGO & ALTON RAILROAD COMPANY, *Appellee.*	No. 501.
INTERSTATE COMMERCE COMMISSION, *Appellant.* *vs* ILLINOIS CENTRAL RAILROAD COMPANY, *Appellee.*	No. 502.

Appeals from the Circuit Court of the United States, for the Northern District of Illinois.

Reply to Brief filed on behalf of Horace Lowry, C. E. Wales and J. L. D. Speer, as Receivers of the Illinois Collieries Company.

Leave to file the brief of the receivers of the Illinois Collieries Company was granted by this court two months after the brief of these appellees was filed. It would seem, therefore, that a reply by the appellees is entirely proper.

There are certain premises assumed by the receivers which are not justified by the record and upon which the success of their argument depends. A con-

sideration of these assumptions will, we believe, be a sufficient answer to the brief.

1. It is assumed that the special cars used for the appellee's own fuel supply are a part of the "facilities of shipment or carriage" to which the public is, as a matter of right, entitled, and which these appellees can only use on the ground of necessity and to the extent of that necessity. Reference to the bill (R., 501, p. 2) discloses the fact that in the Alton case the cars used for the appellee's own fuel supply are of such peculiar construction that they can not be used for commercial business and the appellee restricts these cars to the service of hauling its own fuel supply. As expressed by the Interstate Commerce Commission (R., 501; p. 31):

> "The Chicago & Alton Railroad Company has 360 hopper-bottomed gondola cars which its says are used solely for its own fuel, and which, because no shipper on its line has trestle from which to unload them, are not only inconvenient but impracticable for commercial use."

These cars are restricted to one purpose,—the carriage of the company's own fuel. When not used for that purpose they are not used at all. They in no way differ from tenders of locomotives nor from wheelbarrows, nor from a special conveyor, if such were constructed from the mine tipple to the appellees' chutes. The segregation by the Illinois Central of its ordinary fuel cars for this purpose in no way changes the logic of the situation. The cars do not constitute facilities to which the public is, ever was or ever can be, entitled, and their use by the appellees for the appellees' own fuel purposes can not deprive the public of a "facility of shipment or carriage."

Apply the admitted facts as to the character of these special cars to the argument of the receivers at pages 34, 35, 49 and 51 of their brief and particularly to the example on pages 54 and 55 of the brief. The argument as to the effect of the non-counting of these special cars at once falls to the ground.

2. We do not believe it is seriously argued (Receiver's brief, p. 38) that these special fuel cars constitute "facilities of shipment or carriage" as defined by Section 1 of the Act to Regulate Commerce, and are subject to regulation by the Commission, simply because they are used to "carry" coal. It is true that facilities of "shipment" may refer to loading docks, team tracks, etc., and facilities of "carriage" to cars used in the transportation of freight for the public, but these special cars are no more within the meaning of this section than are the carriers in a pneumatic tube between the offices of a cashier and treasurer of a railroad company. The theory (Receiver's brief, p. 38) that because these special cars are used for coal to be used to run an interstate train, they come within the jurisdiction of the Commission is a sort of "House that Jack Built," the limit to which is lost in the haze of imagination. As well might the Commission claim jurisdiction of a wagon which carries bread to the man who mines the iron to make the car to carry the coal to run the interstate train.

3. It is assumed that because the appellees obtain cheaper coal through the non-counting of their own fuel cars, and because the mines with the fuel contract may dispose of more coal, that there is a violation of the Act to Regulate Commerce. The ap-

pellees are business corporations, and in their position to accept delivery at the mine tipple naturally desire to obtain a reduction in price by reason of their receipt of the coal without interference with shipments, and the mine is willing to concede the lower price for the sake of the increased sales. Any factory owner hauling his coal from the tipple in wagons would have the same advantage as these appellees and would work the same discrimination against other mines. The Commission, in its order does not attempt to say that because a mine has local customers who take 50 per cent. of its production at a period of 50 per cent. car shortage, the mine shall not ship any of its remaining capacity in commerce, but the Commission does say that if the local customers be the appellees, and not some factory owner or farmer, then the mine may not ship coal in commerce. What is the logical distinction?

Of course there is here no question of using purchases of the appellees' own fuel as a device, for the appellees are not engaged in the purchase of coal except for their own immediate use under their boilers (R., 501; p. 16); nor are the appellees competing in any way in the coal business. (R., 501; p. 17.)

4. It is assumed that there is some device existing in any method except that sought to be established by the Commission whereby, as in the case of *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, the appellees discriminate in their duty as common carriers of property. In the *New Haven* case the Chesapeake & Ohio Railroad Company transported in interstate commerce for a consignee coal at less than the cost at the mine

and the published tariff rate. Undoubtedly this was a device which worked a discrimination in the relation of the Chesapeake & Ohio as a common carrier to members of the shipping public. In the case at bar while it is true the practice of the appellees permits a mine to *produce* more coal, it does not permit a mine to have more coal transported in interstate commerce, or at a less expense. Point I of the appellees' brief we believe sufficiently discusses this question.

5. It is assumed that the practice established by the Commission does not regulate the use of the appellees' own fuel cars, but simply the use of the ordinary cars engaged in interstate commerce. The order of the Commission, however, provides that the appellees shall "take into consideration cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines." It is idle to say that this order does not affect the use, when it affects the method of use of these cars.

The argument of the receivers is imaginative in that it is neither based upon the facts as disclosed by the record nor upon the law. The Interstate Commerce Commission has sought to establish a certain practice of distributing and counting appellees' own fuel cars, from which practice appellees were forbidden to deviate in a single particular for the period of two years. The only question in this case under the record and errors assigned, is whether the practice so sought to be established exceeded the power of the Interstate Commerce Commission.

The practice regulates the relation of purchaser and seller where no commerce is involved.

The practice discriminates in favor of a mine having no contract with the appellees as to the amount of coal it may have transported in commerce as compared with a mine having a fuel contract.

The practice discriminates in favor of a mine selling locally to third persons as against a mine selling locally to the appellees.

The practice requires the counting of the special cars of the appellees, but not their locomotive tenders —which are sometimes used (R., 501; p. 3) nor wheelbarrows, though the effect on the mine is the same.

The practice permits the appellees to take for their fuel purposes the entire capacity of a mine during car shortage periods, though every evil alleged to follow any practice except that established by the Commission, would follow such a course of action.

Can it be said that the brief of the receivers logically justifies the authority of the Interstate Commerce Commission to establish and enforce in the future a practice of such a nature.

Respectfully submitted,

GARRARD B. WINSTON,

Solicitor for The Chicago & Alton R. R. Co.

ROBERT MATHER,

F. S. WINSTON,

Of Counsel.

W. S. KENYON,

Solicitor for The Illinois Central R. R. Co.

J. M. DICKINSON,

Of Counsel.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 232.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

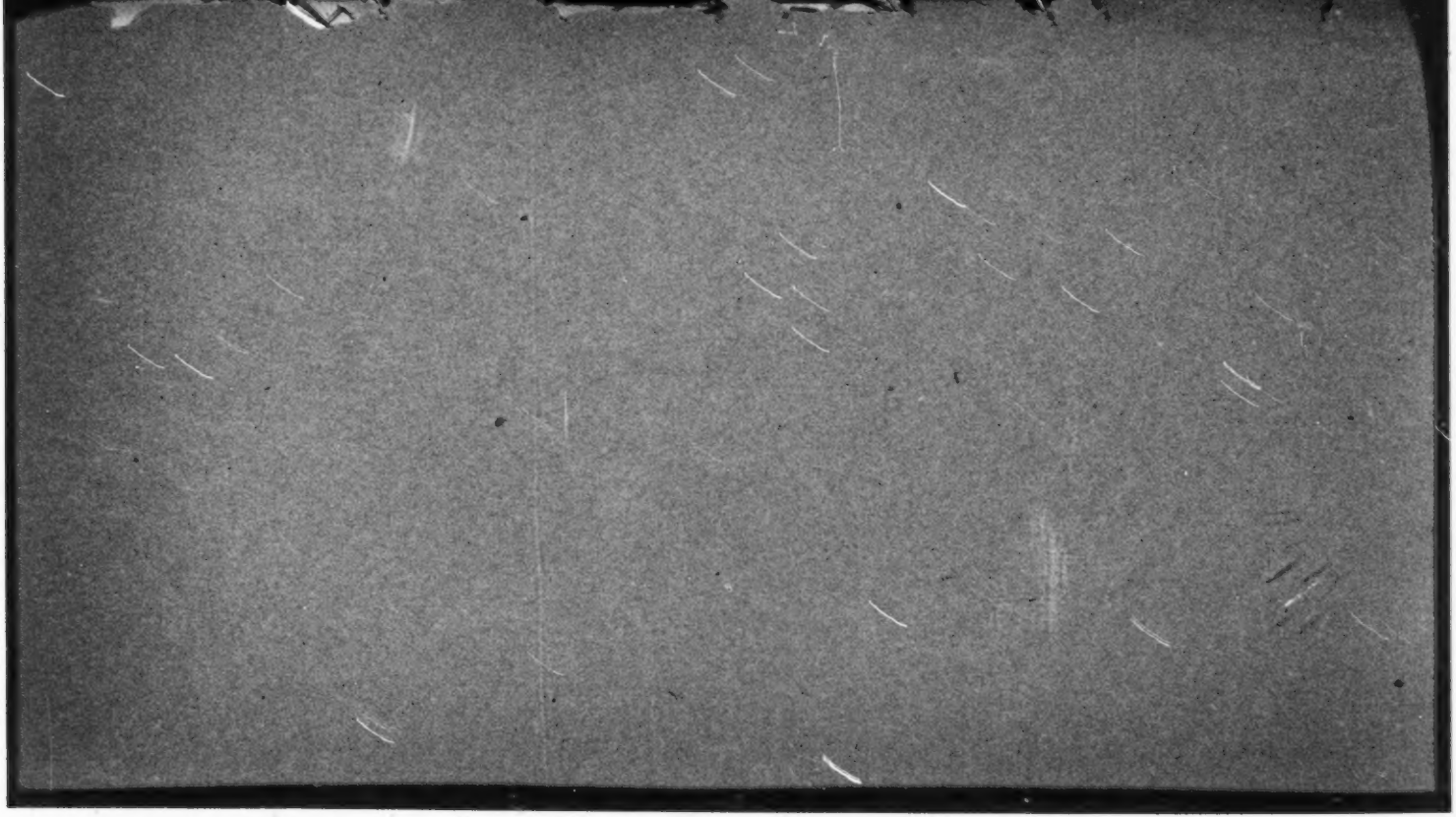
vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 11, 1909.

(21297.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 501.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Peter S. Grosscup, Circuit Judge of the United States for the Seventh Judicial Circuit, on Tuesday, the thirtieth day of June, in the year of our Lord one thousand nine hundred and eight, being one of the days of the regular December term of said Court, begun Monday, the sixteenth day of December, 1907, and of our independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

THE CHICAGO AND ALTON RAILROAD COMPANY,
vs.
INTERSTATE COMMERCE COMMISSION. } 29115.

Be it remembered, that on this day to wit, the first day of June, 1908, come the Chicago & Alton Railroad Company, by its solicitors, Messrs. Winston, Payne, Strawn and Shaw, and filed in the clerk's office of said court in said above entitled cause a certain bill of complaint in words and figures following to wit:

3 *Bill of complaint.*

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY, complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, defendant. } In equity.

To the Honorable the Judges of the Circuit Court of the United States within and for the Northern District of Illinois:

The Chicago & Alton Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, brings this its bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of the Congress of the United States; and thereupon your orator complains and says:

That The Chicago & Alton Railroad Company is a corporation duly organized under the laws of the State of Illinois; that the defendant, the Interstate Commerce Commission, has been created and exists, and during all the time herein mentioned has existed, under and by virtue of an act of the Congress of the United States, entitled

"An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof.

4 Your orator further avers that it has its principal operating office in the city of Chicago, Northern District of Illinois, Eastern Division.

Your orator further avers that The Chicago & Alton Railroad Company is a common carrier, engaged in the transportation of property by railroad from and to points in various States and Territories of these United States to and from points within the States of Illinois and Missouri; that your orator is engaged and has been so engaged since the 29th day of April, 1908, in the transportation of commercial coal from points within the States of Illinois and Missouri to points in the same States and beyond; that numerous coal mines are located on and along your orator's line, within the States of Illinois and Missouri, and principally within the State of Illinois; that these mines ship large quantities of commercial coal by your orator's line to consignees at different points on your orator's railroad, and to points upon the lines of other common carriers; that your orator, for the accommodation of this commercial coal traffic, owns and operates 3,037 gondola coal cars; that, when requested by the consignor or consignee, it furnishes in addition box cars for the transportation of coal; that its said 3,037 gondola cars and such box-car equipment as may be desired by the shippers are sufficient at all ordinary times to transport all commercial coal tendered to your orator for shipment from the mines to consignees at various points upon your orator's line and beyond.

Your orator further avers that certain common carriers who are unable to obtain sufficient fuel for the operation of their railroads from mines located along their own lines deliver unto your

5 orator cars consigned to mines with whom such common carrier may have contracts for fuel; that your orator receives these cars and delivers the same to the mines to which the cars are consigned; that subsequently said cars are loaded by the mines and transported by your orator from the point of loading to the point of delivery to the other common carriers as aforesaid; that these cars delivered by foreign roads unto your orator belong to such foreign roads and do not constitute a part of your orator's equipment; that your orator has no interest in such cars other than the revenue it derives from them in the form of freight for coal hauled by it in such cars for delivery to such foreign roads.

Your orator avers that no mines located along its line own or operate private coal cars on your orator's railroad, and that there are no such private coal cars hauled on your orator's railroad.

Your orator further avers that it is necessary for your orator to have at all times a sure and certain supply of fuel for its own needs; that, without such certain supply of fuel, your orator would not be able to move its trains and operate its railroad in accordance with its charter duties to the public; that your orator has purchased and now operates on its line 360 steel, hopper-bottom coal cars; that said cars

are of an extreme height, to wit, ten feet; that, by reason of such height, said cars can be unloaded only upon specially constructed trestles; that no consignees to whom coal is shipped from mines on your orator's line own or have the use of such trestles, and that such cars are not available for commercial shipment of coal. And your
6 orator avers that it at all times restricts these cars to the service of hauling your orator's own fuel supply, and that by reason of such restriction and by reason of the fact that your orator alone has the means of unloading said hopper-bottom cars, said cars never constitute a part of your orator's equipment available for commercial shipments of coal.

Your orator further avers that it consumes, in the necessary operation of its railroad, from two thousand to three thousand tons of fuel coal per day; that its demand for this fuel is constant, varying but slightly with the amount of the traffic your orator may be required to move over its line and with the seasons of the year. That all fuel coal for the use of your orator is purchased by your orator at the mines and delivered by the mines to your orator at the mine tipple into your orator's cars or locomotive tenders; that all of said coal purchased as aforesaid is consumed by your orator in the necessary operation of its own railroad; that the mines supplying such fuel coal have no title or interest in said coal after it leaves the mine tipple; that no freight is assessed upon said coal; that no person, company, firm, corporation, or locality, with the sole exception of your orator, has any right, title, or interest of any sort, after said coal has been delivered to your orator at the mine tipple as aforesaid, in the subsequent movement carriage, delivery, consumption, or use of such coal by your orator; that your orator is not engaged in the purchase and transportation of coal for the purpose of selling the same to any person or of competing in any way with any shippers or consignees of commercial coal.

Your orator further avers that at certain periods of the year, to wit,
7 in the early winter months, there is a shortage of equipment available for hauling commercial shipments of coal from mines along your orator's railroad; that at times of such car shortage, your orator furnishes various mines along its line with commercial equipment pro rata, in accordance with a certain circular bearing date October 17th, 1906, effective November 1st, 1906, and now in full force upon your orator's lines, said circular being in words and figures as follows:

"THE CHICAGO & ALTON RAILROAD COMPANY,
OFFICE OF SUPERINTENDENT OF EASTERN DIVISION,
Bloomington, Ills., October 17, 1906.

RULES GOVERNING THE DISTRIBUTION OF CARS TO COAL MINES—EFFECTIVE NOVEMBER 1, 1906.

1. The total available empty tonnage will be distributed pro rata to each shipping mine in the ratio the average loading capacity of the mine concerned bears to the average loading capacity of all shipping mines in the same district, except that in cases of extreme shortage of

equipment and inability to supply all shippers a minimum empty tonnage, we reserve the right to distribute available empty tonnage as the exigencies may seem to us to demand, alternating the distribution of the available car supply as in our judgment will ultimately place all shippers on an equality.

2. Equipment furnished for the loading of Chicago & Alton Company's coal, or equipment furnished by foreign railroads to be loaded for account of such foreign road, will not be computed in the available empty tonnage in sight each day.

3. Equipment owned or controlled by coal-mine operators when placed with their own mines for loading will not deprive the mine of receiving its quota of system cars under percentage basis unless such percentage will raise the available empty tonnage beyond the maximum loading capacity of the mine.

8 4. All other equipment, regardless of the class or ownership, will be taken into account in the distribution.

5. Loads remaining on hand at a mine unbilled will be counted as empties each and every day until shipping directions have been furnished.

6. Loaded cars awaiting disposition or unloading beyond the free time will be regarded, in case of car shortage, as empty tonnage at the mine where loaded.

7. If a mine loads cars against an embargo, the shipments will not be accepted, and such cars will be counted against the mine as empties on hand until embargo is raised, or other shipping directions furnished.

8. If a mine is furnished less than a full supply of empty tonnage, the fraction furnished will be counted, if the cars have been ordered and are placed in time to load, and provided the minimum tonnage of cars is supplied.

9. Competitive mines served directly by the Chicago & Alton Railroad will be regarded the same in establishing their rating as though they were local to the Chicago & Alton Railroad.

10. Equipment will not be furnished mines located on the tracks of other railroad companies not reached directly by the Chicago & Alton Railroad without special authority from this office.

11. Equipment on hand at the mines, irrespective of the date allotted and placed for loading, will always be taken into account and charged each day against the mine until loaded and billed out.

12. Mine superintendents should order equipment from the railroad company by noon of each day covering cars required for the following day's loading.

13. A record will be kept in the office of the superintendent of the railroad company showing the rating of each mine, the percentage the output of each mine bears to the total output from the dis-

9 trict, and the number of cars furnished each mine under this adjustment, and these records will be open for the inspection of all interested coal operators.

14. Mine operators are requested to advise the superintendent of the railroad the minimum tonnage necessary for the operation of their properties.

15. If it is desirable to change a rating the mine operator should take the question up promptly with this office, that the matter may be given the consideration it merits.

16. When the rating once established of a given mine is subsequently increased for any reason, all coal operators in the district will be advised of the change.

E. RYDER, *Superintendent.*"

Your orator further avers that it has at all times, even during periods of coal-car shortage, ample motive power and employees to transport all cars that may be delivered to it from any source or for any purpose; and further, that your orator's main track, second track, siding, switches, right of way, and facilities other than cars, are at all times, even during said period of car shortage, amply adequate to handle, conduct, or transport all cars delivered to it from any source or for any purpose.

Your orator further avers that on, to wit, the 27th day of April, 1908, the defendant, the Interstate Commerce Commission, entered an order requiring your orator to cease and desist, on or before the first day of July, 1908, and during a period of at least two years thereafter, to abstain from maintaining and enforcing the present practice of coal-car distribution along its line of railroad, said order being in words and figures as follows, to wit:

"It is ordered that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are, hereby notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting interstate shipments of coal among the various coal operators along their lines.

"It is further ordered that said defendants be, and they severally are, hereby notified and required to establish, on or before said first day of July, 1908, and during a period of at least two years thereafter, to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines, for or as effecting interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to

it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars
11 delivered to it, and the carriers own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

Your orator further avers that a copy of said order was duly served upon a principal officer of your orator at his usual place of business.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, was made upon a complaint filed with said body by the Illinois Collieries Company. That, subsequent to the filing of said complaint, a receiver was duly appointed for said company, and he was thereupon, upon petition substituted as complainant in this cause; to which complaint an answer was filed by your orator and testimony was adduced by the said parties.

Your orator avers that said order of said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration foreign railway
12 fuel cars in determining the distribution of coal cars among the various mines along its line, and to count said foreign railway fuel cars as a part of the mine's pro rata proportion of commercial equipment is unreasonable, unjust, oppressive, and unlawful in that, among other things, the said order attempts to deprive the said foreign railway of the use and benefit of its ownership of such foreign railway fuel cars and of its lawful right to contract for the supply of its necessary fuel.

Your orator further avers that said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration foreign railway fuel cars in determining the distribution of coal cars among the various mines along its line, and to count said foreign railway fuel cars as a part of the mine's pro rata proportion of commercial equipment is unreasonable, unjust, oppressive and unlawful in that, among other things, the said order attempts to deprive mines having

contracts for such foreign railway fuel of their lawful right of contract.

Your orator further avers that said order of said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice of taking into consideration foreign railway fuel cars in determining the distribution of coal cars among the various mines along its line, and to count said foreign railway fuel cars as a part of the mine's pro rata proportion of commercial equipment is unreasonable, unjust, oppressive and unlawful in that, among other things, coal shipped to foreign railways
13 for their own necessary use is in a class different from coal shipped for ordinary commercial purposes, and such foreign railway fuel does not compete with commercial fuel, and there is no undue or unlawful discrimination in failing to count such foreign railway fuel cars against the mines receiving them.

Your orator further avers that said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful, in that, among other things, it deprives your orator of its lawful right to contract with reference to its necessary fuel supply, without interference by the defendant, the Interstate Commerce Commission.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, the practice of car distribution now in full force and effect upon your orator's line is not subject to regulation by the defendant, the Interstate Commerce Commission, either as a whole or in part.

14 Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, the practice sought to be established by the order of the defendant, the Interstate Commerce Commission, is not within the jurisdiction of the defendant, the Interstate Commerce Commission.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to

establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, under the method now in full force and effect upon your orator's line, there is no undue or unreasonable discrimination by reason of the noncounting of your orator's own fuel cars.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among
15 the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, cars for your orator's own fuel supply do not constitute a part of your orator's equipment available for commercial shipment, and the noncounting of such cars does not constitute an undue or unreasonable discrimination by your orator in favor of or against any person, firm, company, corporation or locality.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful, in that, among other things, the counting of such cars as required by the order of the defendant, the Interstate Commerce Commission, deprives the mine having a fuel contract with your orator of its proportionate share of the shipping facilities for commercial coal and works an undue and unreasonable discrimination against such mine.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the pro-
16 portion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, the practice sought to be enforced by the order of the defendant, the Intertsate Commerce Commission, in effect regulates the amount of coal which a mine located upon your orator's line may dispose of, and such practice is not therefore within the jurisdiction of the defendant, the Interstate Commerce Commission.

Your orator further avers that the said order of the said defendant, the Interstate Commerce Commission, in requiring your orator

to establish and put in force a practice taking into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line, and to count as a part of the proportion of the mine to which such cars are consigned, said cars for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, among other things, coal for your orator's own fuel supply does not enter into commerce, and there is therefore no undue nor unreasonable discrimination by reason of the non-counting of cars for your orator's own fuel supply.

Your orator further avers that if the said order of the said defendant, the Interstate Commerce Commission, is allowed to become and be effective, very many suits for penalties will be brought against your orator, and very many suits will be brought against your orator by many persons interested in said order and its enforcement and claiming to be injured by the acts of your orator unless said order is obeyed, which said suits will be brought and prosecuted as aforesaid by very many persons against your orator, whereby your
17 orator will be subjected to a great multiplicity of suits and great loss and damage will be inflicted upon your orator, all of which acts and doings will greatly injure and embarrass your orator in the transaction of its business.

Your orator further avers that notwithstanding the facts aforesaid, the said defendant, the Interstate Commerce Commission, maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of this honorable Court, the said order as an effective order, and institute or suffer to be instituted the judicial procedure aforesaid, which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator.

Your orator therefore prays that upon the filing of this bill a temporary or interlocutory order may be entered herein, suspending the said order of the said Interstate Commerce Commission and restraining the said Commission from taking any steps or instituting any proceedings to enforce said order, and that upon a final hearing of this cause a decree be entered herein, enjoining, setting aside, annulling or suspending the said order of the said Interstate Commerce Commission, and perpetually enjoining the enforcement of said order and perpetually enjoining the said defendant and its members, their agents, servants and representatives, from enforcing the said order and from taking any steps or taking any proceedings toward the enforcement of said order.

Your orator further prays that, if any delay intervenes be-
18 tween the filing of this bill and the issuance of a temporary or interlocutory order, as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orator further prays that such other and further relief be granted in the premises as justice and equity may require.

Your orator prays that your honors may grant unto your orator the writ of subpoena of the United States of America, directed to the said Interstate Commerce Commission, commanding it, on a certain day and under a certain penalty herein to be specified, personally to be and appear before your honors in this honorable court, and then and there full, true and complete answer to make to all and singular the premises, but not under oath, the answer under oath being hereby expressly waived, and to stand to and abide by such order and decree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, etc.

THE CHICAGO & ALTON RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

FREDERICK S. WINSTON,
GARRARD B. WINSTON,
SILAS H. STRAWN,
Of Counsel.

19 STATE OF ILLINOIS, COUNTY OF COOK, *ss:*

George H. Ross, being first duly sworn, says that he is vice-president of The Chicago & Alton Railroad Company, complainant in the above entitled cause; that he knows the facts stated in the above and foregoing bill of complaint, and that the said facts are true.

GEORGE H. ROSS.

Subscribed and sworn to before me this 29 day of May, A. D. 1908.
[SEAL.] ROBT. J. BELL,
Notary Public.

(Endorsed:) Filed June 1, 1908. H. S. Stoddard, clerk.

20 And on, to wit, the tenth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause two certain notice together with the acceptance of services thereon endorsed in the words and figures following, to wit:

Notice.

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY, complainant, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 29115.

To the Honorable E. A. Moseley, secretary of the Interstate Commerce Commission:

Notice is hereby given you that on the first day of June, 1908, there was begun in the Circuit Court of the United States, within and for

the Northern District of Illinois, Eastern Division, a suit brought by the Chicago & Alton Railroad Company, complainant, against the Interstate Commerce Commission, defendant, the object and prayer of which is to obtain a decree setting aside, annulling, and enjoining a certain order entered by the Interstate Commerce Commission specifically set forth in the bill of complaint in said suit, copy of which is attached hereto; that said bill of complaint was filed in the office of the clerk of said court on the first day of June, 1908, and that due notice has been given that on the 11th day of June, 1908,
21 at 10 a. m., before his honor Judge Kohlsaat, an application for a temporary or interlocutory order suspending said order of the said Interstate Commerce Commission, and temporarily enjoining its enforcement, will be presented to said court at the Federal court building, Chicago.

THE CHICAGO & ALTON RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Its solicitors.

Received a copy of the above notice and bill of complaint this fifth day of June, 1908.

EDW. A. MOSELEY, *Secretary.*

(Endorsed:) Filed June 10, 1908. H. S. Stoddard, clerk.

22 And on, to wit, the tenth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain notice, which said notice, together with the acceptance of service thereon endorsed, is in the words and figures following, to wit:

Notice.

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY, complainant, *vs.* THE INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 29115.

To the Honorable Charles J. Bonaparte, Attorney-General of the United States:

Notice is hereby given you that on the first day of June, 1908, there was begun in the Circuit Court of the United States, within and for the Northern District of Illinois, Eastern Division, a suit brought by the Chicago & Alton Railroad Company, complainant, against the Interstate Commerce Commission, defendant, the object and prayer of which is to obtain a decree setting aside, annulling, and enjoining a certain order entered by the Interstate Commerce Commission specifically set forth in the bill of complaint in said suit, copy of

which is attached hereto; that said bill of complaint was filed in the office of the clerk of said court on the first day of June, 1908, and that due notice has been given that on the 11th day of June, 1908, at 10 a. m., before his honor Judge Kohlsaat, an application for a temporary or interlocutory order suspending said order of the
23 said Interstate Commerce Commission, and temporarily enjoining its enforcement, will be presented to said court at the Federal Court Building, Chicago.

THE CHICAGO & ALTON RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

Received a copy of the above notice and bill of complaint this 4th day of June, 1908.

M. D. PURDY,
Acting Attorney-General.
A.

(Endorsed:) Filed June 10, 1908. H. S. Stoddard, clerk.

24 And on to wit, the eighth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain certificate of the Attorney-General in words and figures following, to wit:

Certificate of Attorney-General.

In the Circuit Court of the United States for the Northern District of Illinois.

THE CHICAGO & ALTON RAILROAD COMPANY
vs.
THE INTERSTATE COMMERCE COMMISSION. } 29115.

To the Clerk of said Court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Chicago & Alton Railroad Company against the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," as amended by the act of June 29, 1906, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903, and in further compliance with the provisions contained in section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file

this certificate among the records of the above entitled cause,
25 and immediately furnish a copy thereof to each of the circuit judges of the Seventh Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

CHARLES J. BONAPARTE,
Attorney-General.

WASHINGTON, D. C., *June —, 1908.*

(Endorsed:) Filed June 8, 1908. H. S. Stoddard, clerk.

26 And on to wit, the eleventh day of June, 1908, come the Interstate Commerce Commission, by Mr. Edwin W. Sims, United States attorney for the Northern District of Illinois, and filed in the clerk's office of said court in said entitled cause its certain answer in the words and figures following, to wit:

27 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY, complainant, *vs.* INTERSTATE COMMERCE COMMISSION, defendant.	In equity. No. 29115.

Answer of Interstate Commerce Commission.

L. A. Shaver, solicitor for defendant. H. B. Arnold, special counsel.

28 In the Circuit Court of the United States. Within and for the Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY, complainant, *vs.* INTERSTATE COMMERCE COMMISSION, defendant.	In equity. No. 29115.

The answer of the Interstate Commerce Commission, the defendant herein, to the bill of complaint of the above-named complainant.

This defendant, the Interstate Commerce Commission, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this

defendant is advised it is material or necessary for it to make answer, answering saith:

I.

That this defendant is a bureau or department of the Gov-
29 ernment of the United States which was created and established and now exists under and by virtue of an act of the Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by subsequent acts, and particularly as amended by the act of June 29, 1906, and that the complainant is a common carrier engaged in the interstate transportation of passengers and property, and as such common carrier and in respect to such transportation is subject to the provisions of said act entitled "An act to regulate commerce," and said acts amendatory thereof and supplementary thereto.

II.

That by section 12 of said act this defendant is given authority to inquire into the the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act;" and that among the provisions of the act which this defendant is authorized and required to execute and enforce is the provision of section 1 thereof, requiring "all charges made for any services rendered or to be rendered in the transportation of passengers or property or in connection therewith to be
30 just and reasonable," and forbidding every unjust and unreasonable charge for such service or any part thereof; and, also, the provisions of section 3 thereof, which declares that "it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

III.

That by section 13 of said act it is provided that, among others, any person, firm, corporation, or association may make complaint to this defendant by petition, briefly stating the facts, "of anything done or omitted to be done by any common carrier subject to the provisions of the act in contravention of the provisions thereof;" that a "statement of the charges thus made shall be forwarded" by this defendant "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time,

to be specified " by this defendant; that if such common carrier
31 " shall not satisfy the claim, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty " of this defendant " to investigate the matters complained of in such manner and by such means as it shall deem proper "; and by section 14 it is provided that whenever an investigation shall be thus made by this defendant " it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of " this defendant, " together with its decision, order, or requirement in the premises."

IV.

That by section 15 of said act it is provided that the defendant is authorized and empowered and it shall be its duty to determine and prescribe what regulation or practice in respect to transportation is just, fair and reasonable to be thereafter followed, referring thereby, as provided in said section 15, to transportation of persons and property as defined in the first section of said act, which includes " cars and other vehicles and all instrumentalities and facilities for shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery and handling of property transported."
32 That by said section 15 the defendant is authorized to make an order that the carrier shall cease and desist from such violation of said act and that the carrier shall conform to the regulation or practice so prescribed.

V.

Defendant admits that complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, that defendant was established and exists under and by virtue of an act of the Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof, that complainant has its principal operating office in the city of Chicago, Illinois, that complainant is a common carrier engaged in the transportation of property by railroad from and to points in various States and Territories of the United States to and from points within the States of Illinois and Missouri, that complainant is engaged and has been so engaged since the 29th day of April, 1908, in the transportation of commercial coal from points in various States and Territories of the United States to States and to points in other States, that numerous coal mines are located on complainant's line within the States of Illinois and Missouri, that these mines ship large quantities of commercial
33 coal by complainant's line, and that the coal car equipment of complainant is sufficient to transport the commercial coal tendered to complainant for shipment except during certain seasons of the year hereinafter referred to and known as " car shortage " periods.

VI.

Defendant admits that certain common carriers known as foreign railroads deliver to complainant cars consigned to mines with which such carriers have contracts for fuel, that complainant receives these cars and delivers the same to the mines to which such cars are consigned, that such cars are loaded at such mines and transported by complainant from such mines to the point of delivery for such other common carriers, that the so-called foreign railway fuel cars belong to such foreign railroads and do not constitute a part of complainant's equipment, and that complainant has no interest in such cars other than the revenue it receives in the form of freight for coal hauled by it in such cars for such foreign railroads.

VII.

Defendant says it has no knowledge as to whether or not the owners of coal mines on complainant's railroad own any private cars or that such private cars are hauled on complainant's railroad and therefore demands due proof thereof.

34 VIII.

Defendant admits that it is necessary that complainant should have a supply of coal for its own requirements and that without such coal complainant would be unable to move its trains and operate its railroad, that complainant has purchased and now operates 360 steel hopper bottom coal cars 10 feet in height, and that such cars by reason of their height can be unloaded only upon specially constructed trestles, but defendant avers that it has no knowledge as to whether the consignees on complainant's line own or have the use of such trestles nor as to whether such cars are available for shipments of commercial coal and demands due proof thereof. Defendant has no knowledge as to whether complainant restricts the use of these cars to the hauling of its own fuel supply nor as to whether it constitutes a part of complainant's equipment available for shipments of commercial coal and demands due proof thereof.

Defendant admits that complainant consumes in the operation of its railroad large quantities of coal daily, the amount thereof being unknown to defendant, that the demand for this fuel is constant, that such fuel coal used by complainant is purchased by it at the times and loaded at the mines into complainant's cars or locomotive
35 tenders, that all of said coal purchased as aforesaid is consumed by complainant in the necessary operation of its own railroad, that the mines furnishing such fuel coal have no interest therein after it leaves the mine tipple, that no freight is assessed upon such coal, that no person with the exception of complainant has any right or interest in said coal after it has been delivered to the complainant at the mine tipple, nor in the subsequent movement, carriage,

delivery, consumption or use of said coal, and that complainant is not engaged in the purchase and transportation of coal for the purpose of selling the same or of competing with any shippers or consignees of commercial coal.

IX.

Defendant admits that at certain periods of the year termed "car shortage" periods there is not sufficient of complainant's equipment available for hauling the commercial shipments of coal from mines on complainant's railroad and that at such times complainant furnishes such mines with commercial equipment in accordance with the rules set forth in the circular bearing date October 17, 1906, a copy of which is set forth in complainant's bill.

36

X.

Defendant admits that complainant has even during car shortage periods motive power, employes, tracks, sidings, switches, rights of way and facilities other than cars adequate to handle and transport all cars delivered to it for transportation.

XI.

Defendant avers that on or about the 31st day of October, 1907, the Illinois Collieries Company filed with defendant a complaint against the complainant, under said Act to Regulate Commerce, alleging and claiming that the distribution of cars by complainant under the rules contained in said circular dated October 17, 1906 (which since their adoption have been enforced by complainant), thereby unduly and unjustly discriminated against the mines and operators of coal mines which did not receive said private cars, foreign railway fuel cars and company fuel cars, and prayed that defendant might make an order that complainant desist from the violation of said Act to Regulate Commerce.

A copy of said complaint marked Exhibit A is hereto attached and made a part hereof, the same being filed under the provisions of said Act to Regulate Commerce heretofore referred to herein.

37 Thereafter a full hearing was had by defendant upon said complaint at which said Illinois Collieries Company and complainant were represented by counsel and defendant thereupon made its investigation, findings and report upon said complaint under and in pursuance of the provisions of said Act to Regulate Commerce, a full and true copy of the report, findings and order of defendant thereon being hereto attached marked Exhibit B and made part hereof.

Defendant avers that prior to the filing of said complaint by the Illinois Collieries Company, to-wit, on the 11th day of July, 1907, in the cases of the Railroad Commission of Ohio, et al v. The Hocking Valley Railway Company and the Railroad Commission of Ohio,

et al. v. The Wheeling & Lake Erie Railroad Company, defendant found that the practice of not counting and charging said foreign railway fuel cars and private cars against the mines receiving them resulted in undue and unjust discrimination on the part of said Hocking Valley Railway Company and Wheeling & Lake Erie Railroad Company, and said companies were by the order of defendant required to count and charge said foreign railway fuel cars and private cars against the mines receiving them in the general distribution of cars by such railroad companies respectively. A copy
38 of the report, findings and order of defendant in said proceedings is hereto attached, marked Exhibit C and made part hereof.

In view of the order of said defendant last referred to counsel for complainant herein, on the hearing before defendant and as representatives of complainant, stated that they did not propose to argue the matters passed upon by defendant in said Hocking Valley Railway Company and Wheeling & Lake Erie Railroad Company cases, and conceded for all purposes of that case (out of which this case arises), that foreign railway fuel and private cars are properly a part of the commercial equipment of a common carrier, and agreed that it is right and fair that said private and foreign railway fuel cars should be counted.

Defendant served complainant with the order on the complaint of said Illinois Collieries Company by mailing a copy thereof to the principal officers of complainant.

XII.

Defendant admits that subsequent to the filing of said complaint by the Illinois Collieries Company a receiver was appointed for said company, that such receiver was thereupon substituted as complainant in said proceeding and that complainant herein filed an answer and testimony in said proceeding was adduced by both parties thereto.

39

XIII.

Defendant denies that its said order requiring complainant to establish and put in force a practice taking into consideration foreign railway fuel cars in determining the distribution of coal cars to mines on defendant's line and to count said foreign railway fuel cars against the mines receiving them, in complainant's general distribution of cars, is unjust, unreasonable, oppressive and unlawful, and that said order deprives or attempts to deprive said foreign railroads of the use and benefit of such foreign railway fuel cars and of their right to contract for their necessary supplies of fuel. On the contrary defendant avers that if said foreign railway fuel cars be not counted or charged against the mine receiving them, that undue and unjust discrimination will result in violation of the act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that its said order in requiring complainant to take such foreign railway fuel cars into consideration in its general distribution of coal cars and to count such foreign railway fuel cars against the mines receiving them attempts to deprive mines having such contracts for such foreign railway fuel of their lawful
40 right to contract. On the contrary defendant avers that complainant has no right to recognize any contracts made by such mines nor to distribute cars to such mines in such way as that such mines shall have the undue and unreasonable advantages over other mines in the respects hereinafter set forth.

Defendant denies that its said order requiring complainant to take into consideration said foreign railway fuel cars in its general distribution of coal cars and to count such foreign railway fuel cars against the mines receiving them is unreasonable, unjust and unlawful, or that coal shipped to foreign railways for their necessary use is in a class different from coal shipped for ordinary commercial purposes, but avers that complainant's method of alloting said foreign railway fuel cars to the mines receiving them in addition to the cars which such mines receive in complainant's general distribution of coal cars confers an undue and unreasonable advantage upon such mines and to the disadvantage of the mines which do not receive such foreign railway fuel cars.

Defendant denies that its said order requiring complainant to take into consideration complainant's own fuel cars in its general distribution of coal cars and to count such cars against the mines receiving them is unreasonable, unjust, oppressive and unlawful, or that
41 such order or compliance therewith by complainant would deprive complainant of its lawful right to contract with reference to its necessary fuel supply. On the contrary defendant avers that said order or compliance therewith by complainant will not deprive complainant of any right to contract for its fuel supply, but that by the allotment of cars for its own fuel supply to the mines receiving them in addition to the full distributive shares of such mines in complainant's general distribution complainant thereby confers an undue and unjust advantage on the mines receiving such fuel cars, to the disadvantage of the mines which do not receive such fuel cars, in violation of the act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that its said order requiring complainant in its general distribution of coal cars to take into consideration its own fuel cars and to charge such cars against the mines receiving them is unreasonable, unjust, oppressive and unlawful, and denies that the practice of car regulation on complainant's line is not subject to regulation by defendant under and by virtue of said act to regulate commerce and the acts amendatory thereof and supplemental thereto.

Defendant denies that there is no undue and unreasonable discrimination by reason of the non-counting of complainant's own fuel
42 cars against the mines receiving them, but on the contrary avers that the failure to charge such cars against the mines receiving

them results in undue and unreasonable discrimination in the respects hereinafter set forth.

Defendant admits that cars for complainant's own fuel supply do not constitute a part of complainant's available equipment for commercial shipments, but denies that the noncounting of such cars does not constitute an undue or unreasonable discrimination in favor of or against any person, firm, company, corporation or locality, and on the contrary avers that the failure to count such cars in the general distribution of cars by complainant results in undue and unjust discrimination in violation of said act to regulate commerce.

Defendant denies that its said order requiring complainant to take into consideration its own fuel cars in its general distribution of coal cars and to count such cars against the mines receiving them deprives the mines having fuel contracts with complainant of their proportionate shares of the shipping facilities for commercial coal or that the same works an undue and unreasonable discrimination against such mines, but on the contrary defendant avers that the allotment of complainant's own fuel cars to the mines receiving them in addition to the full distributive shares of such mines under defendant's
43 general distribution of coal cars enables the owners of such mines by the act of complainant in the distribution of its own fuel cars and its available equipment to operate such mines with undue and unreasonable advantages, not possessed by the mines which do not receive such fuel cars, in violation of the act to regulate commerce and acts amendatory thereof and supplemental thereto.

Defendant avers that the failure to count complainant's own fuel cars against the mines receiving them and the allotment of such cars in addition to the full distributive shares of such mines in the general distribution of coal cars by complainant results in unreasonable and undue advantages to such mines, to the disadvantage of the mines which do not receive such cars, in the several respects hereinafter set forth.

XIV.

Defendant avers that the allotment by complainant of said foreign railway fuel cars, private cars, and complainant's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by complainant and the failure by complainant to count and charge said foreign railway fuel cars, private cars, and company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiv-
44 ing such cars and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(a) That the operator receiving the foreign railway fuel cars, private cars or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

(b) That the operator receiving the foreign railway fuel cars, private cars or company fuel cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(c) That the operator receiving foreign railway fuel cars, private cars, or company fuel cars is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future reratings of such mine by complainant for the purposes of car distribution the mine would receive a higher rating and consequently a larger number of cars in complainant's general distribution of cars.

(d) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of mines and laborers.

45 (e) That the development of the mines which do not receive the foreign railway fuel cars, private cars, or company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accelerated.

(f) That by the arbitrary allotment of the foreign railway fuel cars, private cars, or company fuel cars the complainant and the so-called foreign railways are enabled to secure low prices on railway fuel, because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(g) That the operator of the mine receiving the foreign railway fuel cars, private cars or company fuel cars is thereby enabled to make contracts for the delivery of coal distributed over a long period, to an extent that the operator of the mines which do not receive such cars can not do.

Defendant avers that the advantage to the operator of the mine receiving such foreign railway fuel cars, private cars, or company fuel cars in addition to the full distributive share of such mine in the general distribution of cars by complainant enables such operator to produce all of the coal produced by him, including coal for commercial shipments, at a cost of from 5 cents per ton to 20 cents

46 per ton less than the cost of production to the operator who does not receive such cars, such difference in the cost of production being dependent upon the district in which such mines are located and the relative numbers of arbitrary cars received at such mines.

Defendant avers that complainant and other railroads, including such foreign railroads, have been and are enabled to purchase their supplies of coal at prices from 5 to 20 cents per ton less than the prevailing market prices on commercial coal by reason of the arbitrary allotment of such foreign railway fuel cars, private cars or company fuel cars to the mines with which complainant or such foreign railroads may have contracts for their supplies of coal.

Defendant avers that by reason of the arbitrary allotment by complainant of such foreign railway fuel cars, private cars or company fuel cars, the mines receiving them are thereby enabled to produce their commercial coal at from 5 to 20 cents per ton less than the cost of production at the mines which do not receive such cars and thereby have an undue and unreasonable advantage over the operators of such mines which do not receive such cars, in the marketing of their comercial coal.

47 Defendant avers that complainant and such foreign railways urge and insist upon the arbitrary allotment of such foreign railway fuel cars and company fuel cars in order that they may purchase their several and respective supplies of railway fuel coal at prices lower than the market prices on commercial coal.

Defendants avers that complainant as a common carrier and as such engaged in transportation and commerce between points in various States should, in the facilities and services rendered by it to the operators of coal mines on its line and in the distribution of cars at such mines, not confer an advantage to the operators of certain of such mines to the disadvantage of the operators of other mines and that as such common carrier it has no right in the distribution of cars to be loaded with its own fuel or fuel for foreign railroads to so distribute its available equipment as that in connection with the cars for such railway fuel the operator of the mine receiving them shall have the undue and unreasonable advantages hereinbefore set forth.

XV.

Defendant avers that the allotment by complainant to the mines loading coal for complainant in said 360 steel hopper bottom cars, of the full distributive shares of such mines in the general distribution of coal cars by complainant, and the failure by complainant

48 to take such steel hopper bottom cars into consideration and to charge them against the mines receiving them, results in undue and unreasonable preference and advantage to the mines and operators receiving such cars, and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage, in the several respects set forth in paragraph XIV hereof.

XVI.

That this defendant, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, as to questions arising under the commerce acts, held by the courts to be an expert tribunal; that this defendant is also a quasi-judicial tribunal, and its conclusions in this case, and in all cases under said acts, are not the result of ex parte proceedings or investigations, but are the result of investigations strictly judicial; and that

the conclusions of this defendant so arrived at are to be held to be prima facie correct, and should not be set aside by the courts except in a clear case of error.

49

XVII.

That the burden is upon the complainant to show clearly to the satisfaction of this court that the order of the Commission in question is erroneous and should not be enforced, and it is not sufficient to raise a mere doubt in the mind of the court; that the bill of complaint in this case does not set forth, or in any way make a part thereof, the report and opinion of this defendant or the evidence introduced on the hearing before this defendant and upon which the conclusions and order of this defendant are based, and does not allege or show that said order is not justified by the weight of said evidence; and that there is no allegation in the bill of complaint herein that the complainant has discovered or is prepared to adduce any new testimony or testimony in addition to that adduced before this defendant.

XVIII.

This defendant denies all the material allegations of said bill of complaint inconsistent with the allegations set forth in the foregoing paragraphs of this answer from paragraph I to paragraph XV thereof, both inclusive, and now, having fully answered the said bill of complaint in so far as it is advised the same is material and necessary to be answered, denies that the complainants herein are entitled to the relief or any part thereof in said bill of complaint demanded, or any relief whatsoever; claims the same advantage of this, its answer thereto, as if it had demurred to said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf wrongfully sustained.

THE INTERSTATE COMMERCE COMMISSION,
By L. A. SHAVER,
Solicitor for the Commission.

H. B. ARNOLD,
Special Counsel.

50 CHICAGO, STATE OF ILLINOIS, *ss:*

L. A. Shaver, being first duly sworn, says on oath that he knows the contents of the following answer and that the facts stated therein are true to the best of his knowledge, information, and belief.

L. A. SHAVER.

Subscribed and sworn to before me this the 11 day of June, A. D. 1908.

H. S. STODDARD, *Clerk.*

51 EXHIBIT A.

Interstate Commerce Commission.

ILLINOIS COLLIERIES COMPANY, A CORPORATION, complainant,
vs.
CHICAGO & ALTON RAILROAD COMPANY, A CORPORATION, defendant.

The petition of the above complainant respectfully shows:

(1) That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business at the city of Chicago, county of Cook and State of Illinois; that it is engaged in the business of mining and selling coal, and that it is the owner of and possessed of and is operating several, to wit, six coal mines upon, along, and connected with the lines of railroad of the Chicago & Alton Railroad Company; that said Chicago & Alton Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business in the city of Chicago, county of Cook and State of Illinois, and is the owner of and is possessed of, using, and operating a railroad and many lines of railroad extending from the city of Chicago
52 through said State of Illinois and into and through the State of Missouri, and is a common carrier of freights and passengers in the States of Illinois and Missouri, and between the States of Illinois and Missouri, and that it issues through bills of lading and makes through rates of freight from points on its line of railway in the State of Illinois to points in Missouri, Kansas, Colorado, and many other States and Territories of the United States, and receives and transports shipments under through bills of lading and through rates of freight from points in the State of Missouri and other points to points upon its lines of railway in said State of Illinois, and thereby as such common carrier is subject to the provisions of the act of Congress entitled "An act to regulate commerce," approved Feb. 4, 1887, and acts amendatory thereof or supplemental thereto.

(2) That on or about the 17th day of October, A. D. 1906, the said Chicago & Alton Railroad Company addressed and sent to the complainant herein and to all owners of coal mines upon, along, or connected with its said railroad certain rules governing the distribution of cars to coal mines adopted by said Chicago & Alton Railroad Company, which said rules were to become effective November 1, 1906; that said rules are in words and figures following, to wit:

53 "THE CHICAGO & ALTON RAILROAD COMPANY,
OFFICE OF SUPERINTENDENT OF EASTERN DIVISION,
Bloomington, Ill., October 17, 1906.

RULES GOVERNING THE DISTRIBUTION OF CARS TO COAL MINES—EFFECTIVE NOVEMBER 1, 1906.

1. The total available empty tonnage will be distributed pro rata to each shipping mine in the ratio the average loading capacity of the mine concerned bears to the average loading capacity of all shipping mines in the same district, except that in cases of extreme shortage of equipment and inability to supply all shippers a minimum empty tonnage, we reserve the right to distribute available empty tonnage as the exigencies may seem to us to demand, alternating the distribution of the available car supply as in our judgment will ultimately place all shippers on an equality.

2. Equipment furnished for the loading of Chicago & Alton Company's coal, or equipment furnished by foreign railroads to be loaded for account of such foreign road, will not be computed in the available empty tonnage in sight each day.

3. Equipment owned or controlled by coal mine operators when placed with their own mines for loading will not deprive the mine of receiving its quota of system cars under percentage basis unless such percentage will raise the available empty tonnage beyond the maximum loading capacity of the mine.

54 4. All other equipment, regardless of the class or ownership, will be taken into account in the distribution.

5. Loads remaining on hand at a mine unbilled will be counted as empties each and every day until shipping directions have been furnished.

6. Loading cars awaiting disposition or unloading beyond the free time will be regarded in case of car shortage as empty tonnage at the mine where loaded.

7. If a mine loads cars against an embargo, the shipments will not be accepted, and such cars will be counted against the mine as empties on hand until embargo is raised, or other shipping directions furnished.

8. If a mine is furnished less than a full supply of empty tonnage, the fraction furnished will be counted, if the cars have been ordered and are placed in time to load, and provided the minimum tonnage of cars is supplied.

9. Competitive mines served directly by the Chicago & Alton Railroad will be regarded the same in establishing their rating as though they were local to the Chicago & Alton Railroad.

10. Equipment will not be furnished mines located on the tracks of other railroad companies not reached directly by the Chicago & Alton Railroad without special authority from this office.

11. Equipment on hand at the mines, irrespective of the date allotted and placed for loading, will always be taken into account and charged each day against the mine until loaded and billed out.

55 12. Mine superintendents should order equipment from the railroad company by noon of each day covering cars required for the following day's loading.

13. A record will be kept in the office of the superintendent of the railroad company showing the rating of each mine, the percentage the output of each mine bears to the total output from the district, and the number of cars furnished each mine under this adjustment, and these records will be open for the inspection of all interested coal operators.

14. Mine operators are requested to advise the superintendent of the railroad the minimum tonnage necessary for the operation of their properties.

15. If it is desirable to change a rating the mine operator should take the question up promptly with this office that the matter may be given the consideration it merits.

16. When the rating once established of a given mine is subsequently increased for any reason, all coal operators in the district will be advised of the change.

E. RYDER, *Superintendent.*

That said rules have been from the said first day of November, A. D. 1906, to the present time, and still are, in full force and effect, and that said Chicago & Alton Railroad Company still assumes to distribute cars to coal mines upon, along, and connected with its lines of railroad in accordance with the said rules as aforesaid.

56 (3) That the defendant, Chicago & Alton Railroad Company, unjustly discriminates against the owners and operators of coal mines upon, along, or connected with its lines of railroad engaged in shipping coal to points in other States in this, to wit, that while the defendant from day to day distributes its available cars to be loaded with coal from mines along, upon, or connected with its lines of railroad according to the ratings established by it as to the several and respective capacities of such mines, it does not in such distribution consider cars furnished for the loading of fuel coal for said Chicago & Alton Railroad Company, but delivers such cars for the loading of fuel coal for said Chicago & Alton Railroad Company to such mines without charging the same against the percentages or distributive number of cars to which such mines might be entitled under the aforesaid distribution, and at the same time furnishes to such mines the full distributive share of cars which the defendant allows to them under its said method or system of distributing cars.

(4) That the defendant unjustly discriminates against the owners and operators of coal mines upon its lines of railroad engaged in shipping coal to points in other States, in this, to wit, that while the defendant from day to day distributes its available cars as

57 aforesaid, it does not in such distribution consider certain so-called "foreign railway fuel cars" furnished by foreign railroads to be loaded for account of such foreign road, but delivers such foreign fuel cars to such mines without charging the same against the

percentages or distributive number of cars to which such mines might be entitled under the aforesaid distribution, and at the same time furnishes to such mines the full distributive shares of cars which the defendant allows to them under its said method of distributing cars.

(5) That the defendant unjustly discriminates against the owners and operators of coal mines upon its lines of railroad engaged in shipping coal to points in other States in this, to-wit, that while defendant from day to day distributes its available cars as aforesaid, it does not in such distribution consider certain so-called "private cars" when placed at said mines, namely, cars owned or controlled by coal-mine operators or owned or controlled by private persons, firms or corporations, but delivers such private cars to such mines without charging the same against the percentages or distributive number of cars to which such mines might be entitled under the aforesaid distribution, while at the same time furnishing to such mines the full distributive shares which the defendant allows to them under its said method of distributing cars.

58 Wherefore, the complainant prays that the defendant be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce; that it be determined herein what shall be the proper method of distribution of said cars by defendant and the manner in which the same shall be deducted from the distributive shares of cars to which the mines receiving the same may be entitled; that the defendant be ordered to hereafter include in the number of cars available for distribution among said mines upon, along, and connected with its lines of railroad said cars furnished for the loading of fuel coal for the defendant company said "foreign railway fuel cars" and said "private cars;" that the defendant be ordered to cease and desist from maintaining and enforcing the present practice or regulation of failing or refusing to make any count of cars furnished for the loading of fuel coal for the defendant company, foreign railway fuel cars, and private cars, in the distribution of coal cars for interstate shipments of coal among the various coal operators upon, along and connected with its lines of railroad, but that said defendant be ordered and required to establish, maintain and enforce a practice or regulation taking into consideration cars furnished for the loading of fuel coal for the defendant company, foreign railway fuel cars and

59 said private cars, in determining the distribution of coal cars among the various coal operators along its lines of railroad on interstate shipments of coal, and for such other and further order as the Commission may deem necessary in the premises.

Dated at Chicago, Illinois, this —— day of October, A. D. 1907.

ILLINOIS COLLIERIES COMPANY,

By ——— ———,

———— ————.

———— ————,

Attorneys for Complainant.

STATE OF ILLINOIS, COUNTY OF COOK, *ss:*

——— ——— being first duly sworn, on oath says that he is the ——— of the Illinois Collieries Company, complainant in the above entitled cause, and is its authorized agent in this behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true.

——— ———.

Subscribed and sworn to before me this —— day of October, A. D. 1907.

———,
Notary Public.

60 EXHIBIT B.

Before the Interstate Commerce Commission.

GLENN W. TRAER, RECEIVER OF THE ILLINOIS Collieries Company,
v.
CHICAGO & ALTON RAILROAD COMPANY. } No. 1294.

SAME
v.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY of Illinois. } No. 1295.

SAME
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 1317.

Submitted March 11, 1908. Decided April 13, 1908.

Cassoday & Butler for complainant.

Winston, Payne, Strawn & Shaw, and Garrad B. Winston for Chicago and Alton Railroad Company.

W. S. Kenyon for Illinois Central Railroad Company.

Philip Barton Warren for Chicago, Peoria and St. Louis Railway Company of Illinois.

Report and order of the Commission.

61 GLENN W. TRAER, RECEIVER OF THE ILLINOIS Collieries Company,
v.
CHICAGO & ALTON RAILROAD COMPANY. } No. 1294.

SAME
v.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY of Illinois. } No. 1295.

SAME
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 1317.

Submitted March 11, 1908. Decided April 13, 1908.

1. In establishing systems of car distribution, defendants have given the mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the systems established each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive share of the mines to which they are assigned. Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners.

2. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

62 3. Fuel is necessary and essential to the operation of a railroad, and the right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded; but if a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities in such contract and have it upheld on the ground of compelling necessity.

4. In these cases the Commission is of the opinion that as to the privately owned or leased cars and the foreign railway fuel cars the rule laid down in Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep., 398, should apply, and that cars used by defendants upon their own lines for transportation of their own necessary fuel supply may be given in any numbers to the mine or mines from which such fuel supply is received, but if such mine or mines also ship commercial coal the fuel cars so supplied must be counted against the mine or mines.

Cassoday & Butler for complainant.

Winston, Payne, Strawn & Shaw, and Garrad B. Winston for Chicago & Alton Railroad Company.

W. S. Kenyon for Illinois Central Railroad Company.

Philip Barton Warren for Chicago, Peoria & St. Louis Railway Company of Illinois.

REPORT OF THE COMMISSION.

CLARK, *Commissioner:*

The complaint in each of the above cases was filed by the Illinois Collieries Company, but upon the appointment of the receiver for said company he was, upon petition, substituted as complainant in each case. The subject of the complaints is practically the same in all three cases, and they were heard together upon record made in No. 1294 and are to be disposed of in one report.

The Illinois Collieries Company is a corporation with principal place of business in Chicago, Ill. It is engaged in mining and selling bituminous coal, and makes interstate shipments thereof over the lines of the defendants. Its mines are in Illinois and are located upon the lines of the Chicago & Alton Railroad Company and of the Chicago, Peoria & St. Louis Railway Company of Illinois. Its mine nearest to the line of the Illinois Central Railroad Company is 200 feet from the latter's right of way, and is served by that defendant through switching arrangements with the Wabash Railroad Company. Numerous mines of the character of those owned by the Illinois Collieries Company are located upon the lines of the respective defendants.

The several defendants have contracts for their own fuel supply with certain of the mines located on their respective lines.
63 Some of the mines have contracts to furnish foreign railways with coal and others have contracts with purchasers who furnish private cars for the transportation of such coal. Complainant sells its coal almost wholly in the open market, and each of its mines is dependent upon the defendant upon whose line it is located for cars to transport the output thereof. Complainant has no contracts for furnishing fuel coal to the defendants, and, except in a few instances, has not used foreign railway fuel cars nor private cars during the time covered by the complaints.

In establishing a system of car distribution the defendants have given the several mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the system established, each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive shares of the mines to which they are assigned. After the assignment of such cars to said mines, each is given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all. This permits these mines to ship a greater portion of their daily output than mines having the same tonnage rating but that do not have fuel contracts with the defendants nor the use of private or foreign railway fuel cars.

Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine

owners; that the increased allotment to such mines makes a corresponding decrease in the cars to which complainant and the other mine owners would otherwise be entitled, and that their interstate shipments of coal are to the extent of that decrease thus restricted.

The failure to count the defendants' fuel cars against the mines to which they are delivered was not specified in the complaint against the Illinois Central Railroad Company, but in brief and on argument it says that the question is one of great importance to it. At the time of the filing of this complaint the circuit court of the United States for the northern district of Illinois had enjoined the said defendant from counting foreign railway fuel cars and private cars against the mines to which they were assigned. The question of the Commission's jurisdiction of discriminatory practices, in the light of the decision of the Supreme Court in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S., 426, was decided by the Commission in Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep., 398.

64 Defendants in their briefs concede that the prior holding of the Commission, in Railroad Commission of Ohio v. H. V. Ry. Co., supra, eliminates the question of counting private cars and foreign railway fuel cars in the distribution, and that the question of counting the cars used for the defendants' own fuel is really the only question presented for determination. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

The Chicago & Alton Railroad Company has 360 hopper-bottomed gondola cars which it says are used solely for its own fuel, and which, because no shipper on its line has trestle from which to unload them, are not only inconvenient but impracticable for commercial use.

Complainant in these cases presents the following illustration, and argues that such a practice is unjustly discriminatory: A carrier offers to contract with two mines for 500 tons of coal per day, dividing the amount equally between them. The mines are each of 1,000 tons daily capacity. One mine accepts the contract, the other does not, and in turn the carrier gives the remaining portion of the contract to the first mine. The carrier has thus offered to the two mines a market created by itself; one mine has accepted the market so offered and the other has not. This leaves one mine with 500 tons of coal sold in a special market and 500 tons to find a common market, and the other has 1,000 tons to find a common market. The handling of the 500 tons sold to the carrier by the contracting mine requires the equipment of the railroad. The carrier can furnish cars for but 1,000 tons. It says it must have 500 tons for its necessary use, and sends the cars for that amount to the contracting mine.

This leaves available cars of 500 tons capacity, in the distribution of which it says that it will not count the 500 tons that have been given to the contracting mine, but that it will divide the remaining cars on the basis of 1,000 tons rating for each mine, thus permitting the contracting mine to dispose of three-fourths of its output and the other only one-fourth.

The carrier says it is justified in doing this because the first mine has made a contract with it to furnish it coal, which it must of necessity have in order to operate, and as an inducement to such mine to make this contract it does not charge to that mine the number of cars necessary to handle the 500 tons sold to the carrier, and, in further consideration, permits said mine to enjoy the same proportional share in the remaining cars available for distribution as if it had not sold any coal to the carrier.

If two mines of equal daily capacity are located on the line of a carrier, and one sells its entire daily output locally and the other does not sell any locally, but its entire output must find some other market, it is clear that, although the capacities of the mines are the same, and each would be entitled to the same percentage of cars if they were both offering their output to the company, the one would not be entitled to a rating because it would tender no coal and the other would be entitled to the equipment of the company for that day, and if it was sufficient to move its output, both mines would be on an equality, so far as the selling of their output is concerned. But if one mine sells one-half of its output locally and the other none at all, and the carrier has only enough cars to transport one-half the combined output of the two, it would be unfair for the carrier to rate the mine selling one-half of its output locally at the same tonnage as the other mine and give to it one-half of the cars that it had on a given day.

If a carrier assigns to or uses for the transportation of its own fuel supply only such part of its equipment as is reasonably necessary therefor, it may be asked what difference can it make to the shippers along its line whether those cars go to the mine or mines owned by the carrier or to one or more mines with which the carrier has contracts for coal? The shipper who has no fuel contract answers this by saying that when one mine has such contract with carrier and is furnished cars under it without having its distributive share of cars for commercial shipments reduced thereby, such mine is given an advantage over its competitor that has no contract with the carrier, because it is enabled to work its mine more regularly and thus to keep its property in a more efficient condition—to retain its employees and thus to operate more economically and to sell its output more advantageously in the commercial market. To this the carrier and the shipper who has fuel contract with the carrier retort: "You were given an opportunity to take a contract upon the same terms and declined to do so."

Products offered a carrier for shipment in a given locality are usually tendered because the volume produced is in excess of that consumed in the local market. The object of the transportation

requested is to get the surplus to a market of consumption. It is the duty of the carrier, so far as it is in its power, to furnish the means of getting that output either from the mills or from the mines to the market.

That it is the duty of a common carrier to furnish means of transportation and to furnish them alike for all that are similarly situated the Commission has repeatedly held: Richmond Elevator Co.
66 v. P. M. R. R. Co., 10 I. C. C. Rep., 629; Eaton v. C. H. & D. Ry. Co., 11 I. C. C. Rep., 619; Railroad Commission of Ohio v. H. V. Ry. Co., supra; Powhatan Coal & Coke Co. v. N. & W. Ry. Co., 13 I. C. C. Rep., 69.

One industry may not be built up by granting to it transportation privileges which are denied to and which work an unreasonable disadvantage against another industry. All must bear their just proportion, according to circumstances and conditions, of any disadvantage that may arise from insufficiency of facilities resulting from causes which are beyond the carrier's control.

It appears that the defendant, the Chicago & Alton Railroad Company, applied its system of car distribution and ratings thereunder to three mines not located on its lines, but which it reached through switching connections with other railways. Said defendant had no fuel contracts with them, but during the months of September, October, and November, 1907, it furnished cars to said mines under their respective ratings, for the transportation of approximately 130,000 tons of commercial coal. Defendant, the Illinois Central Railroad Company's line, does not reach complainant's mines at Litchfield, although it gives such mines a rating. It does not appear that it furnished cars to these mines.

Unless for the purpose of securing its own fuel supply it is neither right nor proper for a carrier to send its cars for loading at mines that are not located upon its lines at times when it could only supply the demand for cars from mines that are located upon its line, perhaps wholly dependent upon it for both cars and transportation. Such a practice necessarily intensifies an existing inability on part of the carrier to meet the demands of shippers who are dependent upon it and who have a right to rely upon its performance of its duty as a common carrier, and it curtails the already restricted opportunities of the mines that can secure neither cars nor transportation from any other carrier.

The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. In fact, its first duty is to such shippers. See Memphis Freight Bureau v. Ft. S. & W. R. R. Co., 13 I. C. C. Rep., 1. It may not be compelled to nor may it voluntarily divert its equipment from its own line to shippers on another line when to do so would deprive its local shippers of needed equipment. A carrier may, of course, send its equipment from its line for the things that are necessary and essential for its own operation. This right arises from considerations of public policy which recognize the duty of a carrier to operate its line, and the diverting of its

equipment in that instance is predicated on necessity. It is not an inherent right that is grounded on private contract. The limit
67 of this right is measured by the extent of the necessity; it can not go beyond that.

Fuel is as necessary and essential to the operation of a railroad as are rails, roadbed, and other equipment. Without it a carrier could serve no one. The right of a carrier to own mines for its fuel supply is conceded in the law. The right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded, as must also the right to utilize its facilities in providing and transporting those materials and supplies that are essential to the operation of its lines. In fact, a carrier must arrange in advance, by ownership or contract, for its fuel supply. Otherwise its ability to perform its functions would be as uncertain as its fuel supply. For that reason a carrier may contract for its fuel supply, and in so far as the contract is not opposed to public policy or in conflict with the statutes or the rules of law announced by the courts, it must be regarded as any other private contract. Any contract of lawful subject-matter, regardless of the character of the parties, is made with reference to the law applicable thereto, and all principles of public policy involved therein, the statutes and the decisions of the courts relating thereto become as effectually a part of the contract as if they had been expressly referred to therein. If a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy, they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities into such contract and have it upheld on the ground of compelling necessity. Public policy has never permitted a carrier to procure its operating necessities by means of illegal contracts. The substance may be legally subject to contract, but the form of that contract must not be subject to illegal infirmities.

A carrier may lawfully get the coal that it needs so long as it does not violate the rights of or fail in its duty to the public. It must make this contract as it must make all others, keeping in view its duty to perform its public functions and to avoid injury or damage to its shippers by reason of unjust discrimination, undue preference, or unreasonable disadvantage growing out of such contract or the performance thereof. If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof. As before observed, however, this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel. But if a carrier had a contract
68 for more cars of fuel per day than it needed, neither such contract, nor considerations of public policy which recognize the public necessity for fuel, would justify it during a period of car

shortage in using its equipment for a superfluous supply when such equipment was demanded and needed by the shippers and the public.

It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers. Generally speaking, this inability so far as coal shipments are concerned prevails during about four or five months of the winter season, when the demand for coal is greatest and the prices of coal the highest. During the other portion of the year carriers generally have a surplus of idle coal cars.

In *Railroad Commission of Ohio* v. *H. V. Ry. Co., supra,* the Commission held that privately owned or leased cars and cars of foreign railways sent for foreign railway fuel must be assigned to the parties by whom owned or leased, or to whom consigned, but that all such cars must be counted against the distributive shares of such parties. Any other holding would open the door to unjust discrimination between shippers of commercial coal, for it must be remembered that cars of foreign railway fuel are commercial shipments in so far as the carrier transporting them for another carrier is concerned. Such shipments may not be given discriminatory or preferential rates.

The transportation by a carrier of its own fuel over its own lines presents a somewhat different question. Conditions and circumstances vary in different localities, but where a carrier contracts for fuel coal with certain mines located on its lines and served by it, which also compete with other mines similarly located, in the sale of commercial coal, the carrier may not unjustly discriminate in favor of the mine that accepts its proffered contract and thus work undue prejudice against the mine that does not accept such contract. Conceding fully the right of the carrier to use its equipment for the purpose of securing its own fuel supply, even though shippers at the same time desire the use of that equipment, and conceding the right of the carrier to secure its fuel supply either from mines which it owns or those whose entire output it purchases, we are led to the conclusion that where a carrier purchases a portion of the output of a mine which is competing with other mines on its lines in commercial markets it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In these cases we think that as to privately owned or leased cars and foreign railway fuel cars the rule laid down in *Railroad Commission of Ohio* v. *H. V. Ry. Co., supra,* should apply. We
69 think that the Chicago & Alton Railroad Company has a right to confine the hopper-bottomed cars referred to to the hauling of its fuel supply, but that they, together with all other cars used by the defendants upon their own lines for transportation of their own fuel supply, should be counted against the distributive share of the mine or mines to which given, except in cases where the carrier owns or purchases the entire output of the mine for its fuel supply.

An order will be entered accordingly.

70 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

GLENN W. TRAER, RECEIVER OF THE ILLINOIS Collieries Company,
v.
CHICAGO & ALTON RAILROAD COMPANY. } No. 1294.

SAME
v.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY of Illinois. } No. 1295.

SAME
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 1317.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company
71 of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which

such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars.

72 EXHIBIT C.

Before the Interstate Commerce Commission.

RAILROAD COMMISSION OF OHIO ET AL.
v.
HOCKING VALLEY RAILWAY COMPANY. } No. 1008.

RAILROAD COMMISSION OF OHIO ET AL.
v.
WHEELING & LAKE ERIE RAILROAD COMPANY. } No. 1009.

Submitted June 29, 1907. Decided July 11, 1907.

W. H. Ellis, Attorney-General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and order of the Commission.

73 THE RAILROAD COMMISSION OF OHIO ET AL.
v.
THE HOCKING VALLEY RAILWAY COMPANY. } No. 1008.

THE RAILROAD COMMISSION OF OHIO ET AL.
v.
THE WHEELING & LAKE ERIE RAILROAD COMPANY. } No. 1009.

Submitted June 29, 1907. Decided July 11, 1907.

Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so-called "private" cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such "private" and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are
74 necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

W. H. Ellis, Attorney-General of Ohio; H. B. Arnold, R. J. Mauck, and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan, and W. N. Duncan for defendants.

Report and Order of the Commission.

Clark, *Commissioner:*

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The attorney-general of the State appeared for the complainants.

Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the Commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly discriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company, it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway companies, and that while it has not adequate equipment of its own, it has loaned, leased, and furnished cars to the latter company.

In the complaint against the Wheeling & Lake Erie Railroad Company, it is stated that certain so-called "private" cars, claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

Paragraph III of the complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad
75 companies so sending the cars have contracts for the furnishing of fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies, not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that because of that threat and because of the fact that competing roads were not at that time so counting such cars in distribution it ceased to count them; that on

or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against the mines to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent to those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the Railroad Commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which owns
76 nearly all of the stock of the Sunday Creek Company, and the Wheeling and Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake Erie Coal Company. It can not be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

Since this case was argued the complications have been relieved by the Railroad Commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tipple of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial por-

tion of the year it has a large number of idle cars; for the greater portion of the year it is able to provide all the cars needed, but for four or five months in the year it is unable to meet the maximum demand of shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business, the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated, favoritism in the sending of the Hocking Valley Railway's cars to the K. & M. road is alleged, on the ground that many mines of the Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The K. & M. is in substance
77 and effect a part of the Hocking Valley system. In its annual report to this Commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley system through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(a) System cars, which include cars owned by the defendant, or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

(b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars

were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular coal companies, is involved. These are the cars included in class (c) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about $150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases, and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second-lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price advanced
78 by the coal companies, which second-lien car-trust certificates were accepted by the coal companies in return for their cash payments, and, by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies, the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of the mines of the coal companies. Assuming, therefore, that the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company. It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal Mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business and some question as to the jurisdiction of this Commission is suggested. The testimony shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines

for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense. In the case of the Steamer Daniel Ball v. U. S., 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

In the case of the Texas & Pacific Railway Company v. Abiliene Cotton Oil Company, 204 U. S., 426, the court held—

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

79 In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the Commission and makes it its duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this Commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of questions of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the Commission has no power to regulate the distribution of cars, and in this connection reference is made to the Commission's decision in the case of Mason v. C., R. I. & P. R. Co. 12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the Commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the Commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the Commission, it has undoubted power and jurisdiction to deal with complaint that the practices of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the Commission and that of a court of equity.

80 In Johnson Coal Mining Co. v. Hocking Valley Ry. Co., 14 Ohio Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the distribution, to work his mines more economically, more nearly to their full capacity and more steadily. He can therefore afford to sell the fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should

be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion of available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United States et rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Coompany et al., in which the coal
81 company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant, did not count the private cars, or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate-commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever.

"The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"These regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employees of the railroad company and must lessen the facilities in that respect

of the independent operators. Indeed an objection of the railroad company to individual ownership of cars is that they require special switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate-commerce act. The mine operator would, in any state of the car supply, continue to get the exclusive use of his individual cars as before, but when the
82 supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent-mine operators in the Fairmont region.

* * * * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore and Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore and Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate-commerce act would permit these cars now the property of the railroad company to be taken out of its distributable car supply.

* * * * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car-supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of the exclusive use of

their individual cars, but the individual cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they were not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Logan Coal Company *v.* Pennsylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the dis-
83 tribution. The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to discontinue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were so consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

"All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be performed consistently with this paramount requirement of equal treatment to all. * * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown, this enables the relator to ship somewhat more of its daily output than a competitor who only

receives the use of company cars. * * * It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous-coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable to do, and it seems to me that when an operator elects to avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate-commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and, in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company. * * *

84 "What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of Pennsylvania, as to the propriety of counting the foreign railway fuel cars in the distribution of equipment, are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of

the act to regulate commerce, and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the Commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private" cars for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

It is to be noted that the recommendation of the Commission refers to "private" or "individual" cars in fact; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they were not intended, as seems to have been contemplated by the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars, and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars
85 is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage, because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions which require

carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assignment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all will be on an equality, and the effect can not be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This Commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In Rice, Robinson & Witherop v. W. N. Y. & P. R. Co., 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

86 It is admitted that the cars so held under lease are devoted to the exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal-mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of $150,000 in cash, for which, in a comparatively short period, they received an equivalent amount of interest-bearing car-trust certificates. Assuming that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals, to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided

for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

Order.

Upon the foregoing report—

It is ordered, That the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation
87 taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal; and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

(Endorsed:) Filed June 11, 1908. H. S. Stoddard, clerk.

88 And on, to wit, the twenty-ninth day of June, 1908, there was filed in the clerk's office of said court in said entitled cause a certain opinion in the words and figures following, to wit:

Opinion.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

CHICAGO AND ALTON RLD. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } No. 29115. In equity.

ILLINOIS CENTRAL RLD. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } No. 29116. In equity.

Before Grosscup, Baker, and Kohlsaat, circuit judges.

These causes are substantially alike and were submitted together for final decree upon the bill and answer.

Complainants are interstate common carriers. Along the line of each in Illinois are mining districts within which the operators are dependent upon one or the other of these carriers to get to market their product in excess of local consumption.

Following are the classes of cars involved: (1) Coal cars owned by complainants and used by them in hauling coal for shippers generally; (2) private cars owned by coal mining companies or by
89 their customers and used in conveying coal from the mines to the customers; (3) fuel cars owned by foreign railroads and used on complainants' roads in hauling coal from the mines to the delivery points for the foreign railroads; (4) fuel cars owned by complainants and used by them in carrying coal from the mines to their own coal chutes. Complainants purchase no coal except for their own use.

The greater part of the year there is more equipment at hand than there is coal to haul. But during the winter months a car shortage generally occurs. Prior to April 13, 1908, complainants were accustomed to deal with a shortage of coal cars in this way: They rated each mine according to the relation its average producing capacity bore to the average producing capacity of the district in which it was located, and they distributed to each mine its prorate share of the available equipment of class one, above enumerated; but they did not count or in any way take into consideration the available equipment of classes two, three, and four.

On April 13, 1908, the Interstate Commerce Commission, in a proceeding duly pending, made the following order: "It is ordered that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby

notified and required, on or before the first day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or
90 regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

"It is further ordered that said defendants be, and they severally are hereby, notified and required to establish on or before said first day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other
91 said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

Complainants, contending that their method of distribution is right, ask to have the enforcement of the Commission's order enjoined.

The Commission's report is found under the title of Traer v. Chicago & Alton Rld. Co. et al., 131 C. C. Rep., 541. Other cases bearing upon the questions herein involved are Ry. Com. of Ohio et al. v. Hocking Valley Ry. Co. et al., 12 I. C. C. Rep., 398; U. S. ex rel. Pitcairn Coal Co. v. B. & O. Ry. Co., 154 Fed., 108; Logan Coal Co. v. Pa. Ry. Co., 154 Fed., 497.

BAKER, circuit judge, delivered the opinion of the court.

I. The so-called private cars.

A charter duty of railroads is to provide cars as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no
92 vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers cannot be required to take into consideration the cars of shippers who do only an intrastate business.

Where Federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local
93 constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

II. Fuel cars of foreign railroads.

The fact that these railroads are themselves common carriers has nothing to do with the case. Here they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment.

III. Fuel cars of complainants.

Coal is bought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel.

But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate com-
94 merce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operator's local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine. And we perceive no just ground for a difference, if the mine's diminished capacity comes from the carrier's act. While the carrier's cars that are being employed in hauling its own fuel are not a part of the available commercial equipment, yet the diminished capacity of the mine to tender coal for transportation in commerce should be taken into consideration, and computing the average number of the carrier's own fuel cars set out at a mine may be the easiest and surest way of gauging that mine's diminished capacity.

In our judgment, complainants are not entitled to relief against that part of the order which requires them to count the so-called private cars and the fuel cars of foreign railroads as available commercial equipment. But they are each entitled to an injunction against the enforcement of that part of the order which commands them to count their own cars that are being employed in hauling their own fuel as available commercial equipment, and
95 against their being compelled to take such fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce.

Decrees will be entered accordingly.

(Endorsed:) Filed June 29, 1908. H. S. Stoddard, clerk.

96 And afterwards, to-wit, on the thirtieth day of June, 1908, being one of the days of the regular December term of said

court 1907, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to-wit:

Decree of June 30, 1908.

THE CHICAGO & ALTON RAILROAD COMPANY
vs.
INTERSTATE COMMERCE COMMISSION. } 29115.

This cause coming on to be heard at this term of court, and being submitted for final decree upon bill and answer to Circuit Judges Grosscup, Baker, and Kohlsaat, the court having heard argument of counsel and being now fully advised in the premises, finds that the complainant is entitled to the relief asked in its bill as to those parts of the order of the defendant relating in any way to the use or counting of cars for complainant's own fuel and is not entitled to the other relief asked for, and the same is denied.

It is ordered, adjudged, and decreed as follows: That the said Interstate Commerce Commission, its members, their agents, servants and representatives, should be and the same are perpetually enjoined and restrained from enforcing and from taking any steps or taking any proceedings towards the enforcement of that part of said order of said Interstate Commerce Commission which commands said complainant on or before the first day of July, 1908, to cease and desist and during a period of at least two years thereafter to
97 abstain from failing or refusing to make any count of its own fuel cars that are being employed in handling its own fuel in the distribution of coal cars among the various coal operators along its line, and also that part of said order of said Interstate Commerce Commission requiring said complainant to establish on or before said first day of July, 1908, and during a period of at least two years thereafter, to maintain and enforce a practice or regulation taking into consideration cars used for its own fuel supply in determining the distribution of coal cars among the various coal operators along its line, and all other parts of said order determining and prescribing a method of use or counting of cars employed by said complainant in handling its own fuel.

98 And afterwards to wit, on the ninth day of July, 1908, come the Interstate Commerce Commission by Edwin W. Sims, district attorney for the United States for the Northern District of Illinois and filed in the clerk's office of said court its certain petition for appeal in words and figures following, to wit:

Petition for appeal.

THE CHICAGO & ALTON R. R. CO., complainant, *vs.* INTERSTATE COMMERCE COMMISSION, defendant.	In equity. No. 29115.

Petition for appeal.

The Interstate Commerce Commission, being a bureau or department of the Government of the United States, by Edwin W. Sims, district attorney of the United States for the Northern District of Illinois, being thereunto duly authorized, represents that in the decree or order of said circuit court, in the above stated case, rendered on the 30th day of June, 1908, there is manifest error to its injury, and, therefore, prays for an order granting an appeal from said decree to the Supreme Court of the United States.

EDWIN W. SIMS,
District Attorney of the United States for the Northern District of Illinois.

(Endorsed:) Filed July 9, 1908. H. S. Stoddard, clerk.

99 And on the same day, to wit, the ninth day of July, 1908, come the Interstate Commerce Commission, by Edwin W. Sims, United States Attorney for the Northern District of Illinois, and filed in the clerk's office of said court in said entitled cause its certain assignment of errors in words and figures following, to wit:

Assignment of errors.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

The CHICAGO & ALTON R. R. Co., complainant, *vs.* INTERSTATE COMMERCE COMMISSION.	In Equity. No. 29115.

Assignment of errors.

And now comes the Interstate Commerce Commission, by Edw. W. Sims, district attorney of the United States for the Northern District of Illinois, and charges that in the decree rendered by said circuit court for said district in the above entitled cause on the 30th day of June, 1908, and in the record and proceedings therein there is manifest error to its injury in this, to wit:

1. Said court erred in not dismissing the bill of complaint for want of equity.

2. Said court erred in not dismissing said bill because there is no allegation therein that irreparable injury will result from the failure to enjoin the enforcement of the order in question and no facts are

alleged showing, or tending to show, that such injury will or can result therefrom.

3. Said court erred in not dismissing said bill because there is not set forth therein, or made a part thereof as an exhibit, the report and opinion of the Commission stating the grounds upon which it based the order in question.

100 4. Said court erred in not dismissing said bill on the allegations and denials of the answer of the Interstate Commerce Commission, and particularly the allegations marked "a," "b," "c," "d," "e," "f," and "g," in Paragraph XIV of said answer.

5. Said court erred in holding that the complainant was "entitled to an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands it to count its own cars that are being employed in hauling its own fuel as available commercial equipment."

6. Said court erred in granting an injunction against the enforcement of that part of the order of the Interstate Commerce Commission which commands the Chicago & Alton Railroad Company "to count its own cars that are being employed by it in hauling its own fuel as available commercial equipment."

7. Wherefore, the Interstate Commerce Commission prays that so much of the decree of the circuit court herein as enjoins that part of the order of said Commission which requires the said railroad company to count its own fuel cars employed in hauling its own fuel as available commercial equipment, rendered on the 30th day of June, 1908, be reversed, and that said circuit court be ordered to enter a decree, dismissing the petition or bill filed in the above entitled cause in said court by the said railroad company against said Interstate Commerce Commission.

EDWIN W. SIMS,
District Attorney of the United States for the Northern district of Illinois.

(Endorsed:) Filed July 9, 1908. H. S. Stoddard, clerk.

101 And on the same day, to wit, the ninth day of July, being one of the days of the regular July term of said court, 1908, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry, to wit:

Order of July 9, 1908, allowing appeal.

THE CHICAGO & ALTON R. R. CO.
vs.
INTERSTATE COMMERCE COMMISSION. } 29115.

In this cause, the Interstate Commerce Commission, by Edw. W. Sims, district attorney of the United States for the Northern Dis-

trict of Illinois, thereunto duly authorized, having made its application in writing for an appeal from the decree therein, rendered on the 30th day of June, 1908, to the Supreme Court of the United States, and the said Interstate Commerce Commission, being a bureau or department of the Government of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of $5,000, exclusive of costs, it is, therefore, ordered that said appeal be, and the same is, hereby granted and made returnable on the ninth day of August, 1908.

102 *Praecipe for transcript of record.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON RAILROAD COMPANY,
vs.
INTERSTATE COMMERCE COMMISSION. } 29115.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States at Washington, D. C., under the appeal heretofore perfected to said court and include in the said transcript the following pleadings, proceedings and papers on file, to wit:

Bill of complaint filed June 1, 1908; 2 notices filed June 10, 1908; certificate of Attorney-General filed June 8, 1908; answer of Interstate Commerce Commission filed June 11, 1908.

Opinion filed June 29, 1908.

Decree entered of record June 30, 1908.

Petition for appeal filed July 9, 1908.

Assignment of errors filed July 9, 1908.

Order entered of record July 9, 1908, allowing appeal.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed July 24, 1908. H. S. Stoddard, clerk.

103 NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, *ss:*

I, H. S. Stoddard, clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court, made in accordance with Praecipe filed in the cause entitled "The Chicago & Alton Railroad Company vs. Interstate Commerce Commission," as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the city of Chicago, in said district, this twenty-fourth day of July, 1908.

[SEAL.] H. S. STODDARD, *Clerk.*

104 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

THE CHICAGO & ALTON R. R. CO., complainant, *v.* INTERSTATE COMMERCE COMMISSION, defendant.	In Equity. No. 29115.

Citation on appeal.

The United States of America, Seventh Judicial Circuit.

The President of the United States, to the Chicago & Alton Railroad Company or to F. S. Winston, its solicitor of record, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office, in the United States Circuit Court for the Northern District of Illinois, in the cause, wherein the Interstate Commerce Commission was defendant and said Chicago & Alton Railroad Company was complainant, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Hon. P. S. Grosscup, U. S. circuit judge for said Seventh Judicial Circuit, this the 9th day of July, in the year of our Lord one thousand nine hundred and eight.

P. S. GROSSCUP,
Circuit Judge.

Service of the above citation accepted this 10th day of July, 1908.
F. S. WINSTON.

(Indorsed:) Circuit Court of the United States, Northern District of Illinois, Eastern Division. Filed July 9, 1908. H. S. Stoddard, clerk.

(Indorsement on cover.) File No. 21297. N. Illinois C. C. U. S. Term No. 501. The Interstate Commerce Commission, appellant, vs. The Chicago & Alton Railroad Company. Filed August 11th, 1908. File No. 21297.

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